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THE ROLE OF RULES
IN THE CONCEPT OF LAW

by



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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies for acceptance, a thesis entitled "The Role of Rules in 'The Concept of Law'", submitted by Beverley Marian McLachlin in partial fulfillment of the requirements for the degree of Master of Arts.

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ABSTRACT

Professor H.L.A. Hart's recent book, The Concept of Law, holds a unique place in contemporary legal philosophy. At a time sceptical of systematization, it ventures a comprehensive account of the central elements of law. Against a background of increasing emphasis on the role of morality in law, it urges the separation of law and morality. Most importantly, it stands as one of the few major attempts to explain law in terms of rules. For all these reasons, it invites further study.

This thesis constitutes a critical comment on the role of rules in The Concept of Law. It focuses on two related issues: the validity of an explanation of a legal system in terms of rules and the relationship between law and morality.

Accordingly, the thesis' first concern is to establish the adequacy of Hart's account of legal rules as an explanation of law. To this end, Chapter II examines the ability of rules to explain the mandatory force of law, Chapter III the sufficiency of an account of the processes of law-obedience and judicial decision, and Chapter IV the validity of the distinctions drawn by Hart between types of legal rules and between rules and

other elements of law. On the basis of the conclusions of this endeavour, a critical examination of Hart's account of the relationship of law and morality will be attempted in Chapters V and VI. A three-faceted method will be applied throughout; the thesis will seek first to analyze Professor Hart's position on the issue under discussion, secondly to evaluate its merits, and finally, if and when it is deemed necessary, to attempt expansion or revision.

TABLE OF CONTENTS

	Page
CHAPTER I	1
CHAPTER II.	12
CHAPTER III	34
CHAPTER IV.	60
CHAPTER V	79
CHAPTER VI.	97
FOOTNOTES	129
BIBLIOGRAPHY.	143

Chapter One

1. Preliminary Summary

The theme of this essay is the use of the concept of rules and its significance for the relationship between law and morality in Professor H.L.A. Hart's recent book, The Concept of Law.¹ Preliminary to more detailed analysis of Professor Hart's work, a brief summary of the book's thesis is proposed.

Hart states that the aim of the book is to "advance our understanding of law" and to provide an answer to the recurrent question, "What is Law?".² This larger question is seen as embracing three more particular problems: (1) how does law differ from and how is it related to orders backed by threats?; (2) how does legal obligation differ from and how is it related to moral obligation?; (3) what are rules and to what extent is law a matter of rules?.³

Answers to these questions may assume several different forms. While Hart admits that he intends to describe and explain the salient features of law, he denies any attempt to define:

[The book's] purpose is not to provide a definition of law, in the sense of a rule by which the correctness of the use of the word may be tested; it is to

advance legal theory by providing an improved analysis of the distinctive structure of a municipal legal system and a better understanding of the differences between law, coercion and morality as types of social phenomena.⁴

The reasons that Hart cites for rejecting an attempt to define law are first, the absence of a higher class necessary to define law per genus et differentiam,⁵ and secondly because definition in terms of necessary and sufficient conditions would be arbitrary since

. . . the diverse range of cases of which the word 'law' is 'properly' used are not linked by any such simple uniformity, but by less direct relations--often of analogy of either form or content--to a central case.⁶

Nor is Hart's study in the main normative; his concern is to explain existing rather than ideal legal systems.

Turning from the aim to the argument of The Concept of Law, Hart begins by presenting a modified version of John Austin's theory of law. He criticizes Austin's account of law as the sovereign's orders backed by threats with its associated concepts of sanctions and habitual obedience to the sovereign.⁷ To establish the inadequacy of Austin's model, he argues that there are varieties of law which cannot be explained in terms of orders backed by threats. Laws which do not impose duties but confer powers, which bind the lawmaker as well as the subject, or which originate in custom, are

impossible to account for in terms of orders backed by threats, Hart argues. Nor can the model of orders backed by threats explain why people generally obey the law despite changes in the constitution of the legislative body, nor why law remains valid even though it lies dormant for long periods of time. In these situations, obedience of the law cannot be attributed exclusively to fear of consequences arising from past experience. Thus Austin theorized that people obeyed out of habit in such cases. Hart argues that Austin's combination of orders, threats, and habitual obedience does not adequately describe the "internal" attitude people have toward law when they accept it as the proper guide to conduct.⁹ Nor can a description of law in terms of orders explain the fact that the legislator may be restricted by constitutional limitations.

Hart also rejects Kelsen's account of law as directions to officials to apply sanctions in the event of certain acts being committed. This view has the advantage over the Austinian account of being able to accommodate power-conferring rules. Hart, however, dismisses it, along with a modified version which interprets duty-imposing rules in terms of orders to individuals and power-conferring rules in terms of orders to officials, as purchasing "pleasing uniformity of pattern . . . at too high a price: that of distorting the different social

functions which different types of legal rule perform."¹¹

Hart goes on to argue that an explanation of law based on rules which are accepted by people, rather than on orders backed by threats, finds no difficulty in explaining either the variety of laws or difficulties associated with the sovereign-subject relationship. Rules can bestow powers to create new legal relationships as easily as they can impose duties. Unlike orders, they may bind the person promulgating them. Substitution of internal acceptance of rules by those upon whom they are binding allows explanation of the continuity, persistence and constitutional limitations found in law as the Austinian combination of sanctions and habitual behavior could not. Acceptance by people of a rule that the law shall remain valid under certain circumstances explains the continuity and persistence of law, while constitutional limitations are interpreted in terms of acceptance by the legislator of a rule that empowers legislation and at the same time marks the limits of that power.

Having made a prima facie case for the advantages of explaining law in terms of rules, Hart sets forth a theory of law based on rules. He contends that the "heart" or "essence" of a legal system is best conceived as a union of two types of rules, primary and secondary. Hart indicates that there are other elements involved in legal systems, but that they remain of secondary importance.¹²

Primary rules resting on a basis of obligations, are regarded by Hart as the most fundamental element of a legal system. Viewed in terms of internal acceptance of obligations rather than sanctions, they are distinguished from other social rules by the seriousness of the social pressure for conformity to them, by the fact that they are regarded generally as important for the continuance of society, and by the considerable sacrifice of individual desires and interests which they may demand.¹³ The secondary rules of a legal system, on the other hand, are power-conferring rules about primary rules.¹⁴ Hart distinguishes three types of secondary rules: the rule of recognition; rules of change; rules of adjudication.¹⁵

It is possible to regard a rule either internally or externally, in Hart's opinion. When one regards a rule internally, one regards it as a standard by which to regulate one's own behavior and on the basis of which the conduct of others in breach of it may be criticized.¹⁶ Acceptance of obligation under one of the primary rules is one sub-class of the internal attitude which may be adopted to any social rules, be they of etiquette or of law. In contrast, to regard a rule externally is to see it as a pattern of uniform behavior or in terms of consequences likely to follow deviation from this pattern, rather than to accept it as a standard of what constitutes

proper conduct.

Internal acceptance of rules of law replaces sanctions in the Austinian theory as the effective source of what makes the law "binding" and "obligatory".¹⁸ In a primitive regime lacking secondary rules to officially enforce and confer recognition upon the primary rules of obligation, most people must internally accept the obligation of these rules, Hart states.¹⁹ In a more advanced regime, where both primary and secondary rules are present, it is sufficient if two conditions are met: (1) that people generally obey the law, from any motives whatever; (2) that the officials of the system internally accept the secondary rules by which the primary rules are identified as valid law and enforced.²⁰ The latter requirement would seem to rest on the fact that there is no higher group to "enforce" conformity by the officials to the secondary rules of the system.

This is the basis of Hart's theory of law. It is supplemented, however, with other important, if not central, elements:

The union of primary and secondary rules is at the centre of a legal system; but it is not the whole, and as we move away from the centre we shall have to accommodate, in ways indicated in later chapters, elements of a different character.²¹

Although he does not state precisely what "additional elements" he has in mind, his remarks in later chapters indicate the "penumbral", "open-textured" areas of law,

justice and morality must be thus regarded.

The penumbral area of open-texture in the law accounts for the latitude in certain cases for the exercise of judicial discretion unfettered by the dictates of particular rules.

All systems, in different ways, compromise between two social needs; the need for certain rules which can, over great areas of conduct, safely be applied by private individuals without fresh official guidance . . . and the need to leave open, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case.²²

Hart distinguishes between the area of core and that of penumbra, between the vast majority of cases governed by unproblematic application of settled rules and the occasional borderline case in which the courts must exercise discretion. Areas of discretion are explained by the fact that language is not precise but "open-textured", allowing latitude to classify a novel case under more than one rule. The judge's conception of the purpose of the law will influence his decision in such cases; an indefinite or ill-defined purpose increases his latitude. But discretion remains the exception to normal, determinate rule-following; it is not conceived as part of general rule-following logic but as an element added to the core of primary and secondary rules.²³

Primary and secondary rules are further supplemented by moral elements. Hart treats morality as

primarily a system of rules, similar to the primary rules of obligation associated with law.²⁴ This system is distinguished from law in four ways: (1) moral rules are always, unlike legal rules, of great social importance; (2) moral offences are necessarily voluntary; (3) morality cannot be suddenly changed; (4) morality is enforced by social pressure without official sanctions.²⁵

Having thus characterized morality, Hart discusses its relation to law. He is prepared to acknowledge that there are many ways in which law and morality are related. Morality may influence the content of law. It may serve as a critical standard by which the law is condemned or justified. It may aid in the interpretation of rules equivocal in open-textured areas. Finally, the maintenance of procedural justice such as equal application of the law to all, fair trials, the right to publication of laws and to hearings, may well be considered functions of morality.

The claim of the traditional natural law view that law is truly law only insofar as it conforms to a higher moral law is rejected by Hart.²⁶ Following the tradition of legal positivism in this respect, he is adamant in maintaining the distinction between law as it is and as it ought to be.²⁷ His criterion for the identification of a rule as valid law is the rule of recognition in which moral considerations have no part.

While rejecting the traditional form of natural law, Hart introduces his own concept of a "minimum content of natural law", which is composed of rules so basic as to be essential to survival. Since all societies share the goal of survival, these rules are found in all moral codes and enforced in all legal systems, at least with respect to certain classes of society.²⁸

2. Preliminary Questions

Hart's theory of law and its relation to morality raises a number of questions which merit further consideration. It is not surprising that most relate to the "heart" of his theory--his concept of rules.

Hart's conception of the "logic" of rules, so important to his view of what makes law binding and the process of judicial decision, has been questioned by some. Is the distinction between internal and external attitudes toward rules drawn on the proper lines?²⁹ Should sanctions be awarded a more important role? Is the importance of internal acceptance overstressed? Can the penumbral area of the law be regarded as part of the logic of rules instead of an additional element?

A second possible source of difficulty are the distinctions drawn by Hart between different types of rules. Can the distinction between duty-imposing and

power-conferring rules be maintained? In what ways, if any are the two related? Is the distinction between primary and secondary rules exhaustive of all rules found in law?

The relation of law to morality also raises questions. Is morality a matter of rules, as Hart assumes? If so, how do moral rules differ from the primary rules of obligation of the legal system?³¹ The relationship of law to morality raises further difficulties.

Problems of a more general nature concern the sufficiency of an explanation of law in terms of primary and secondary rules. Granting that Hart has shown rules to play a central role in law, it can be doubted whether adequate emphasis has been placed on other features of law. For example, do orders have a place in a legal system? Hart allows them only a minor role, secondary to rules. It may be that despite his express assertion that primary and secondary rules must be supplemented by other elements, reductionist tendencies remain.

The foregoing questions are expressions of query rather than criticism, aimed only at indicating the need for further inquiry into Hart's concept of rules. Commenting on The Concept of Law, J. Kemp says:

. . . an analysis of the concept of law which makes central use of the concept of a rule, however valuable it may be, in helping us to correct common errors, is still seriously incomplete until we are

quite clear about the nature of rules; and this clarity is something which Hart's account does not completely achieve. He says a great deal about various types of rules and illustrates their working by well-chosen, concrete examples; but the concept itself is neither defined nor given an adequate general explanation.³²

It is with a deeper elucidation with at least some features of rules important to law that this essay will chiefly be concerned.

Our first concern will be with what may loosely be termed the "logic" of rules and will comprise an examination of Hart's explanation of the binding, or imperative nature of law followed by a discussion of the processes of law obedience and judicial decision. Next, the viability of Hart's distinctions between types of rules will be broached. The essay will conclude with an application of the conclusions thus far to the nature of morality and its relation to law and the legal system.

CHAPTER TWO

A good starting point for an account of law, Professor Hart tells us, is an "appreciation of the fact that where there is law, there conduct is in some sense non-optional or obligatory".¹ In discussing this feature of law, our concern will be to answer two questions: (1) What is Hart's analysis of the mandatory force of law and is it correct and complete?; (2) Can the mandatory force of law be adequately explained in terms of rules?

1. Hart's Analysis of the Mandatory Force of Law

Hart emphatically rejects two explanations of what makes the law binding or mandatory which have in the past received wide acceptance. He argues that the Austinian emphasis on the threat of sanctions and the reliance of legal realism on the prediction of the consequences of a breach of the law do not provide adequate explanations of what makes law binding. Both fail to account for important features of laws, chiefly, the "internal" attitude normally accorded them. Rejecting externally imposed motives such as sanctions as the source of the mandatory force of law, Hart urges that the binding nature of the law must ultimately be traced to internal acceptance of the rules comprising the law on the part of some or all people.

This emphasis on the internal aspect of law has been described as the book's principle contribution to legal philosophy.² The distinction between internal and external modes of regarding a rule is not novel.³ But Hart's adoption of it to explain legal necessity is highly original.

In order to understand Hart's view of what makes law binding, "primary" and "secondary" rules must be distinguished. In explaining the binding nature of primary rules Hart emphasizes the concept of obligation. Acceptance of obligation under the rules of the legal system is really regarding the primary rules from an internal point of view, that is, as a standard by which to regulate one's conduct and on the basis of which it is appropriate to criticize the failure of others to meet its requirements. Obligation, it will be recalled, is distinguished from other social rules by the more serious and insistent social pressure accompanying it, by the feeling the rules involved are important to the preservation of society, and by the fact that it is accepted that conformity may conflict with personal desires.

It is Hart's view that in a primitive system without secondary rules, the majority must accept the obligation of the primary rules and regard them from the internal point of view. However, where secondary rules of recognition, change and adjudication are introduced in

support of the primary rules, acceptance by most people of the primary rules is not mandatory; it is sufficient that general obedience to the system is secured, whatever the motives. Since Hart characterizes obedience out of any motives but fear of official sanctions as accepting the law "internally",⁴ it follows that when he says obedience need not be accompanied by internal acceptance of the law, he means that it may be out of fear of sanctions for the most part. In contrast, Hart maintains that the secondary rules of a legal system must be internally accepted by the officials concerned with making and administering the law. Obedience, he argues, cannot explain what legislators and judges do in making and adjudicating the law.⁵ Moreover, there would seem to be no alternative to the need for officials to internally accept the system, since there is no one above them to impose sanctions on them, and to postulate such a body in any case would only serve to create the need for a higher body and so on ad infinitum. Thus acceptance by the officials of the rule of recognition, and thus the validity of the system, is for Hart the ultimate base of the mandatory force of a legal system. As opposed to Kelsen's assumed norm of validity, the effectiveness of the rule of recognition in Hart's book depends on the fact of its official acceptance. To illustrate the fact of acceptance he borrows Wittgenstein's analogy to the standard metre bar in Paris which

is accepted, without demonstration, as the official criterion for the metre. So it is with the official criteria for valid law.⁶

Hart's position on what makes law binding may be summarized in two statements. First, in a primitive system without secondary rules, acceptance of legal obligation by almost everyone is necessary. Secondly, in a mature system possessing both primary and secondary rules, law is binding provided that it is generally obeyed (for whatever motives) and that the officials enforcing the primary rules internally accept the secondary rules of the system, particularly the rule of recognition.

It is thus seen that while sanctions have a role in the necessity of law, the real base of what makes law binding is internal acceptance, in Hart's opinion. Elsewhere he says:

'Sanctions' are . . . required not as the normal motive for obedience, but as a guarantee that those who would voluntarily obey shall not be sacrificed to those who would not.⁷

Hart's account of what makes law binding, for all its thoroughness, presents certain difficulties. One problem is his characterization of the difference between an internal and external attitude toward a rule. Morris has pointed out an apparent inconsistency in Hart's descriptions of the two. Describing internal acceptance, Hart tells us:

Allegiance to the system may be based on many different considerations: calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do. There is no reason why those who accept the authority of the system should not examine their conscience and decide that, morally, they ought not to accept it and for a variety of reasons continue to do so.⁸

He also maintains:

The external point of view may very nearly reproduce the way in which the rules function in the lives of certain members of the group, namely those who reject its rules and are only concerned with them when and because they judge that unpleasant consequences are likely to follow violation.⁹

It is difficult to understand why someone obeying out of calculations of long-term interest is to be regarded as viewing the rules internally, while obedience out of a judgment that unpleasant consequences will follow breach should very nearly reproduce the external point of view.

A second difficulty is whether duty-imposing rules and power-conferring rules can both be spoken of as being internally accepted in the same sense. It is true, as Hart asserts, that a power-conferring rule sets up a standard in terms of which conduct can be appraised as "right" or "wrong".¹⁰ We say, for example, that it is wrong not to have witnesses present when making a will. But this would seem to be a different sense of wrong than that found in the proposition "It is wrong to steal". In order to say that it is wrong not to have witnesses present at the making of a will, we must assume that the

testator wanted to make the will. Stealing, however, is wrong regardless of the thief's intentions. Similarly, failure to comply with a technicality of a power-conferring rule will not subject the testator to the criticism of members of the community in the same sense as theft will subject the thief to criticism.

The dual hallmarks of an internal attitude toward rules according to Hart is that they be regarded as a general standard of behavior for the social group and the basis for justifiable criticism of those failing to conform. Yet it seems that power-conferring rules are neither a social standard nor a basis for general criticism of the conduct of others in the same way as duty-imposing rules. It is therefore necessary to conclude that acceptance of power-conferring rules differs from the internal aspect of duty-imposing rules.

This raises the question of the sense in which the officials of a legal system may be said to accept the secondary power-conferring rules. Although the secondary rules may mark out the bounds of the powers of officials, they do not bind them to any standard of conduct in the sense of a duty-imposing rule; if the legislator, for example, decides that a law which has been passed is not desirable, he may withhold final approval. Only on the assumption that he desires to legislate does the standard acquire normative force. This would seem to

indicate that it is misleading to speak of internal acceptance of secondary rules of law in the same sense as internal acceptance of primary, duty-imposing rules.

A related problem is the fact that the officials making and administering the law are usually conceived as bound by duties and obligations to the public. Yet secondary rules, according to Hart, are power-conferring rules which cannot impose obligations or duties. How then is the public duty of officials to be explained? Hart offers no answers, but demonstrates the difficulty by himself attributing duties to officials in contradiction to his view that they act under secondary rules only.¹¹

Graham Hughes criticizes Hart's view that the officials must internally accept the secondary rules on the ground that officials may perform their tasks out of a variety of motives, such as the desire for honour, respect, and financial or personal security.¹² To this it may be replied that Hart would probably classify such motives as calculations of long-term interest, which, it has been seen, is considered by him to be compatible with internal acceptance. But while this may rebut Hughes' objection it does not remove the difficulty of accepting Hart's characterization of calculations of long-term interest as "internal" and avoidance of unpleasant consequences (sanctions) as external.

Finally, Hart's treatment of sanctions raises difficulties. He states that

'Sanctions' are . . . required not as the normal motive for obedience, but as a guarantee that those who voluntarily obey shall not be sacrificed to those who would not.¹³

How is this statement to be reconciled to his other statement that "vast numbers may be coerced by laws which they do not regard as morally binding",¹⁴ and his position that so long as the officials accept the secondary rules of the system, the people generally need not internally accept the law but may obey from other motives, i.e. fear of sanctions?¹⁵

Thus Hart's view of what makes law binding prima facie reveals difficulties relating to his distinction between the internal and external aspects of rules, to his stand on official acceptance of secondary rules and to his position on the role of sanctions. An attempt will be made to meet these problems in the critical reconstruction of Hart's picture of the mandatory forces of law which follows.

2. A Revised View of the Mandatory Force of Law

The following arguments will attempt to show that the foregoing difficulties are the result of ambiguity resulting from the conflation by Hart of the normative force of morality with the mandatory force of law qua law.

Upon reading The Concept of Law, it becomes apparent that the primary rules of obligation at the centre of Hart's concept of law are in reality rules of morality. Without venturing into the perplexities of an exhaustive definition of morality, it would seem that those features by which Hart distinguishes obligation from the internal aspect of other social rules might well be used to describe morality. Most would accede to the proposition that morality entails a system of standards accepted by a social group and regarded as appropriate standards for behavior and justifiable criticism of deviants. Similarly, it seems apparent that morality is enforced by serious social pressure, is generally felt to be important to the maintenance of the social group, and may involve sacrifice of individual desires. Thus morality shares the primary characteristics of the rules of obligation.

Although throughout the book Hart treats primary rules of obligation as rules of law only, he at one point concedes that primary rules of obligation as described by him in the context of legal necessity, might equally well qualify as moral rules:

The basic element in the shared or accepted morality of a social group consists of rules of the kind which we have already described in Chapter V when we were concerned to elucidate the general idea of obligation, and which we there called primary rules of obligation. These rules are distinguished from others both by the serious social pressure by which they are supported, and by considerable sacrifice

of individual interest or inclination which compliance with them involves. In the same chapter we also drew a picture of a society at a stage in which such rules were the only means of social control. We noticed that at that stage there might be nothing corresponding to the clear distinction made, in more developed societies, between legal and moral rules.¹⁶

The resultant picture is that of two complementary but distinct sets of rules. On the one hand, legal rules officially designate certain forms of conduct as mandatory in accordance with the requirements of the rules of recognition of the system and enforce them by the threat (in the case of duty-imposing rules) or promise (in the case of power-conferring rules) of certain official consequences following breach or conformity. On the other hand, moral rules whose normative force stems from general acceptance by the members of the social group of the obligations they impose and from the diffused social pressure brought to bear on deviants, must be distinguished. The content of the primary rules of law and the moral rules of obligation may be shared, or in Hart's phrase, "overlap".¹⁷ In these cases we may say that the demands of the law are supported by the normative force of morality.

But this raises the problem of distinguishing between moral obligation and legal obligation in the sense in which Hart postulates it. He sets this distinction as one of the three major questions to be answered by the book.¹⁸ Yet it is not unfair to say that he encounters some difficulty in drawing the distinction

clearly.¹⁹ If the primary rules of the system basically impose moral obligations, how are these to be distinguished from the legal obligations they impose when secondary rules are added to make a system of law? It would seem that legal obligation must be legal obligation simply because it is in the context of a legal system. But surely this is not good enough, since morality, too, is often found in this context. The four differences Hart points out between moral and legal rules--the importance, the immunity from deliberate change, the voluntary nature of moral offences and the form of pressure associated with morality--offer little help with respect to the problem of distinguishing moral from legal obligation.

These difficulties can be avoided if the view that obligation is an exclusively moral concept is adopted. While admitting that in most cases the law would in fact be backed by moral acceptance and hence that there would be an obligation to do what the law prescribes, this view would acknowledge that the law qua law, aside from moral considerations, rests on the twin facts of official recognition and enforcement of the law. It is difficult to conceive of an obligation imposed by the primary rules of a legal system which is not a moral obligation. Hart tells us that in order to be obligatory the standard in question must be generally accepted by

the social group as the proper standard for behavior and as a basis upon which the deviation of others must be criticized. It must be backed by serious social pressure, be thought of as important for society and often involve personal sacrifice. These criteria do not in any way depend on the erection of a rule to the status of law, but rather involve social values and attitudes independent of legislation. More important than most mere social rules, yet in no way dependent on formal legal recognition, obligations, as defined by Hart himself, can only be moral obligations.

It is true that one may feel an obligation to obey a law whose content imposes no moral obligation on one. But this is not primary obligation in the sense Hart uses of acceptance of the particular rule involved as a social standard supported by social pressure. Rather, it is an obligation based on the moral principle that one ought to obey the law.²⁰ It is suggested that in so far as one may speak of legal obligation it must be in this sense of a moral obligation to obey the law. There thus would seem to be two ways in which the normative force of morality supports the mandatory force of law: (1) where law and morality share the same content, the law will be backed by a moral obligation relative to the particular content of the rule; (2) regardless of the

content of the legal rule, it may be supported by acceptance of a moral obligation to obey the law.

It has been suggested that the foregoing view helps to clarify the difference between moral and legal obligations; in addition, it offers a satisfactory explanation of the relative "internality" of morality and "externality" of law to which Hart alludes.²¹ Law is thought to be external in that it requires only certain acts and is less concerned with intention and motive, while morality is not concerned with acts so much as with the internal facts of intention and motive. If obligation backed by social pressure is thought of as the basis for the normative force of morality, and official recognition backed by sanctions is thought of as the basis for the normative force of law, the internal-external distinction becomes clearer. Official recognition and official action for the most part define offences in terms of external criteria because of the difficulties of proof involved with intention and motive, while obligation is conceived as varying with personal factors affecting the relation between people and hence with intention and motive. If official action is the sole source of the necessity of the law, independent of moral backing, it follows that legal methods will be concerned more with external attitudes. Correlatively, if obligation, with its dependence on motive and intention, is thought of as

exclusively moral, morality will seem to be internal in so far as it too depends on motive and intention.

3. The Logical Form of Rules of Law

It has thus far been suggested that the clearest way of explaining the mandatory force of law is to distinguish between the normative force flowing from morality and that flowing from the fact that the rules in question are identified as law by the rules of recognition of the legal system. To this end it has been argued that obligation is best considered as a moral concept only, while the mandatory force of law qua law should be seen as a matter of official promulgation and enforcement of laws. Legal necessity thus conceived might be supported by the normative force of morality in either of two forms: (1) a moral obligation stemming from the content of the law; (2) a moral obligation to obey the law, independent of content. It now becomes necessary to indicate in more detail how the logic of the moral imperative differs from that of the legal imperative.

Professor Hart recognizes that there are important differences between types of imperatives:

There is also great need for a discrimination of the varieties of imperatives by reference to contextual social situations. To ask in what standard sorts of situation would the use of sentences in the grammatical imperative mood be normally classed as 'orders', 'pleas', 'requests', 'commands', 'directions', 'instructions', etc., is a method of discovering not

merely facts about language, but the similarities and differences, recognized in language, between various social situations and relationships.²²

It would seem that social rules of conduct constitute a type of imperative distinct from orders, pleas, requests, commands or directions. Social rules alone are standards of behavior applicable to classes of people in standardized, recurrent situations. The mandatory force of such rules may be classified in one or both of two ways: it may rest on acceptance of the prescribed conduct as good in itself; or on the desire to produce or avoid consequences conditional on compliance with or breach of the law. The first class may be called independent imperatives, the second conditional imperatives.

An example of a conditional imperative is: "If you desire a valid will, you must have it witnessed". The normative force of the proposition is dependent on one's desire to make a valid will. In the absence of affirmation of the desire for the conditional result, a valid will, the imperative part of the proposition, ". . . you must have it witnessed", loses its force.

Moral rules, interpreted in the sense of rules of obligation, take the form of the independent normative. A moral proposition may be considered correct without a statement of conditions and without further explanation. It is a value judgment and as such needs no supplementation. In Hart's words, we can subtract the sanction and

still leave an intelligible standard of behavior.²³ Thus moral principles imposing obligation may be felt to be binding even when rational justification is absent. It is to be noted, however, that the normative force of a moral principle may, from the point of view of one who does not accept the conduct indicated as good in itself, take the form of the conditional imperative, enforced by motives of fear of criticism for breach of the rule or hope of reward for compliance.

The "if-then" model of the conditional imperative typically describes the imperative of rules of law, both duty-imposing and power-conferring. In both cases the mandatory force of the law depends on acceptance of a condition. In duty-imposing rules, the condition is the desire to avoid the sanction provided for breach. The statement in the Criminal Code that anyone found guilty of non-capital murder is liable to life imprisonment, cast in the imperative, takes the following form: "If one wishes to avoid life imprisonment, one must not commit capital murder". In the case of power-conferring rules, the condition is the promise of a certain legal status with its rights and obligations upon performance: "If you wish to make a valid will, it must be signed by two witnesses." The difference in form between duty-imposing and power-conferring rules is that in the former case the condition is the negative fear of sanctions and in the

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latter the positive desire for certain consequences. In both cases the condition involves official consequences following on either breach or performance. Hart alleges that the fact that nullity may not always be an evil to the person in breach indicates a fundamental difference between the nullity of power-conferring rules and the sanctions of duty-imposing rules.²⁴ To this it may be replied that sanctions may, like the nullity that follows a void contract, occasionally be of benefit, as in the case of rehabilitative treatment.

Where law and morality overlap, as is often the case in duty-imposing rules, the rule may be cast either in the form of the independent normative, in the form of the conditional imperative, or in both. Where moral obligation is absent, however, obedience is likely to be dependent upon the sanction or promise of the conditional imperative. It may be argued that regarding the law from the point of view of obligation parallels Hart's concept of internal acceptance, while looking on it as a conditional imperative is similar to what he describes as the "external" approach to law.

4. Conclusions

If, as has been suggested, morality, whose normative force rests on obligation, is distinguished from the mandatory force of law qua law, which arises from official

recognition and enforcement of the law, Hart's version of what makes law binding is altered in two ways. First, there is a franker recognition of the role morality plays in supporting law; in Hart's picture, where obligation is conceived in legal terms, there is no acknowledgement of the importance of morality in the enforcement of law. Secondly, sanctions are given a role more definite than Hart's mere "guarantee". Where moral obligation provides the motive for obedience, there sanctions may be only guarantees. But at the same time, it is they which serve to distinguish the mandatory force of a primary rule of morality from that of a rule of law. They thus become an essential element of a description or definition of law.

In addition to clarifying the problem of the nature of moral and legal obligation, the suggested approach avoids the difficulties in Hart's conception mentioned earlier. The first problem, it will be recalled, was that of reconciling Hart's view that while acceptance of a rule because of long-term calculations of self-interest was an example of the internal attitude toward the rule, acceptance because of fear of consequences closely represented the external approach to law. It is significant that acceptance out of calculations of long-term interest is compatible with acceptance of a moral rule and its obligation, while acceptance out of fear of

sanctions is associated exclusively with the official character of law. It may be that what Hart had in mind was the distinction between a moral and a legal approach to a rule whose content made it both law and morality. This corresponds with comments made earlier on the identity of a moral approach and Hart's internal approach to law.

The doubts expressed with respect to treating internal acceptance of duty-imposing and power-conferring rules as the same thing, are explained by the different logical forms of rules imposing obligations and rules conferring powers. The former, to the extent that their content overlaps with morality, may be cast in terms of absolute obligation, while the latter, having no moral analogues, are not supported by obligation and rely solely on external "conditions" for their mandatory force. While acceptance of duty-imposing rules usually implies acceptance of the conduct prescribed as good in itself, acceptance of power-conferring rules is acceptance not of the conduct in itself, but of the condition such conduct will bring about. While it is important to make this distinction clear, the same analysis makes clear (as Hart's does not) the kinship between duty-imposing and power-conferring rules of law--duty-imposing rules of law, when regarded externally, apart from legal obligation, share with the power-conferring rules the form of

the conditional imperative.

The fact that acceptance of power-conferring rules differs from internal acceptance of obligations explains why an official's failure to comply with a procedural requirement, perhaps intentionally, is not construed as a breach of the prescribed standard of conduct; the end result is the only basis on which he may be criticized. An explanation of the fact that official duties are usually encumbered by obligations to the public, is found in the juncture of law and morality in these areas. With the legal power to legislate, for example, goes the moral duty to legislate in the best interests of the people. While the power must be stated in the form of the conditional imperative, the duty is an absolute norm. The requirements of oaths of office and the imposition of fiduciary duties on officials in the roles of legislators and judges indicates that great reliance is placed on moral obligation in ensuring the proper exercise of their powers, probably because of the lack of other checks on such officials.²⁵

With respect to the apparent inconsistency pointed out in Hart's comments on the role of sanctions in law, it must be conceded that part of the difficulty may stem from a failure to distinguish clearly between the conditions necessary for the existence and the maintenance of a legal system. When Hart says that great

numbers may be coerced and that so long as the officials accept the secondary rules it does not matter whether the mass internally accept the law so long as they obey even out of fear of sanctions, he may be speaking of conditions for the existence of a legal system. When he says that the majority must accept the law and that sanctions are guarantees for the recalcitrant few, he may be speaking of what is necessary to ensure a stable, lasting legal system. If so, the distinction between existence and maintenance might have been more clearly drawn.

In any case, the suggested revisions would allow a clearer picture of the role of sanctions in the mandatory force of law than that presented in The Concept of Law. In Hart's view, sanctions are necessary, yet incidental and secondary in explaining what makes law binding. On the view presented, sanctions, applied to rules designated as law by the rules of recognition, constitute the source of the mandatory force of law qua law. Of course, where there is moral acceptance of an obligation to obey either a particular rule or the law in general, the actual role of official, legal, sanctions may, as Hart suggests, be reduced to a mere guarantee.

There remains the question of whether the mandatory force of law can be adequately explained in terms of rules. The initial difficulties indicated by Hart's picture of what makes law binding left some doubt on

this matter. However, if the suggested reconstruction of his views--in particular the explanation of various types of laws in terms of the conditional imperative and absolute normative forms of the imperative--is accepted, it would seem possible to answer the question of whether rules can explain what makes law binding in the affirmative.

CHAPTER THREE

The concept of necessity discussed in the previous chapter explains the function of rules as standards regulating behavior. The concern of the present chapter will be the way in which this function is carried out. What happens in rule-following and rule-adjudication? How are general rules applied to particular situations? How do rules justify conduct in particular situations? Can a system of rules adequately explain what happens in obeying the law and rendering judicial decisions?

1. Hart's Concept of Rule-Following and the Judicial Process

It will be recalled that the first part of The Concept of Law is concerned to show the defects of the Austinian theory of law based on orders and the superiority of a theory of law founded on rules. One of the reasons given for preferring rules is that while rules generally apply to classes of cases and courses of conduct, orders are ordinarily individuated, face-to-face directives enjoining particular courses of conduct.¹ Thus rules accord with what Hart considers an essential characteristic of law:

. . . the law must predominantly, but by no means exclusively, refer to classes of persons, and to classes of acts, things, and circumstances; and its successful operation over vast areas of social life depends on a widely diffused capacity to recognize particular acts, things, and circumstances as² instances of the general classification law makes.

Details of Hart's explanation of law bear out his reliance on the generality of law. The continuity of law through years and changing governments presupposes general rules applying to particular cases,³ as does the persistence of laws which remain valid despite long periods of dormancy.⁴ The origin of many laws in custom indicates that they embody general practices.⁵ Without the general applicability of rules their function as standards for behavior generally accepted by the social group would be impossible. Hart's endorsement of the principle of treating like cases alike in the context of his discussion of justice⁶ is an affirmation that conduct should be governed by general rules which prescribe similar treatment of all falling under them.

Despite the importance of general rules, Hart admits that as a matter of practicality, it is impossible to formulate rules which will cover all possible situations:

In fact all systems, in different ways, compromise between two social needs: the need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues, and the need to leave open, for later

settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case.⁷

Hart's statement of the problem and his solution is Aristotelian.⁸ Having decided that it is not practically possible to formulate rules covering all possible situations, he concludes that rules must be supplemented with other elements which can account for the particularity of certain cases. Hart throws into relief the "core" and the "penumbral" areas of law, "those wide areas of conduct which are fully controlled ab initio by rule, requiring specific actions", and the "fringe of open texture" and "variable standards".⁹ While rule-following and judicial decisions in the "core" are governed "by determinate rules which, unlike the application of variable standards, do not require . . . a fresh judgment from case to case", in the "penumbral" area they are governed by discretion and judicial creativity.¹⁰ Thus Hart supplements rules with judicial discretion and creativity.

Hart's distinction between the "core" and "penumbral" areas of law is explained by what he terms the "open-texture" of language. Although judges in penumbral situations may appear to be applying rules, the variability of the meanings of words in the rule (which increases with the generality of the rule) in fact allows room for

judicial discretion. The open-textured nature of laws, combined with the doctrine of judicial precedent, explains how a rule of law may be gradually narrowed or broadened.

In order to fully appreciate the significance of Hart's position it is necessary to consider the background against which he writes. To this end, a brief review of two extreme positions, which may be called rule formalism and legal realism, is proposed, after which compromise positions, of which Hart's view is one, will be considered.

3. Rule Formalism

Both those who reject rules as an adequate explanation of the legal decision process and those who supplement rules with other elements agree in their rejection of what is sometimes pejoratively termed "rule formalism". Rule formalists are accused of seeing law as strictly a deductive process which may be characterized as follows:

- (1) Statement of the rule;
- (2) Identification of the fact situation in question as a particular instance of the general statement of the rule;
- (3) Conclusion prescribed by the general rule.

This deduction, applicable to both rule-following and rule-adjudication, imbues law with a mechanical certainty idealized by the 19th century positivists, who thought of judicial decision largely as a matter of fitting a case

into the appropriate code pigeon holes.¹¹

The correlative of the deductive theory is the "declaratory" theory of judicial decision. Judges do not make law, but merely declare what the rules demand. Creativity is the prerogative of the legislature. It is usually also denied that judicial decisions are properly considered part of the law; in support of this view it is pointed out that judgments may be reversed on appeal, while the law must be certain and enduring.¹²

Those who reject the deductive explanation of the decision process of law object that it does not explain important features of law, such as its ability to gradually change through more liberal or more conservative decisions and the operation of the doctrine of stare decisis. They point out that the validity of the deductive picture depends on rules precise enough to apply to every situation conceivable, a situation which does not exist and cannot practically be made to exist due to our inability to foresee all possible combinations of facts.

3. Rule Scepticism

Since the deductive picture was in effect an attempt to explain the decision process exclusively in terms of rules, it is not surprising that those who found

it deficient reacted by excluding rules from their explanation of the nature of law-obedience and legal adjudication. Chief among these "rule-sceptics" are the legal realists. Although they differ on many points, they share the tenet that the law is basically a collection of descriptive generalizations about official conduct. Although generally admitting the generality of the law, they attribute it not to rules but to uniformity of judicial behavior.

John Chipman Gray, one of the first to criticize the adequacy of the deductive picture, argued that statutes and precedents themselves are not law--only the fact that Courts apply rules is what makes them law. Rejecting the picture of law as a system of abstract principles, he asserted that law "is not an ideal but something that actually exists".¹³ Oliver Wendell Holmes dropped all talk of rules: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law."¹⁴ A host of followers, among them Llewellyn, Oliphant, Moore, Judge Hutcheson and Frank devoted their efforts to working out theories of the prediction of judicial attitudes.¹⁵

While the positive aspect of the legal realism's views is an emphasis on law as a predictive account of official acts, its negative aspect is the derogation of logic and rules in the judicial process. The vagueness

of legal terms pointed out by Professor Bingham led to the view that all deductive systems are arbitrary.

Oliphant spoke of the "inductive" theory of law whereby he sought to discover in judgments premises which would explain the decision in terms of social policy, while Jerome Frank has turned his attention from the major to the minor premise of the deductive syllogism, pointing out the elements of chance, prejudice and conditioning determining which facts the judge finds. If they have not denied the existence of logic and rules in law, the legal realists have certainly challenged their sufficiency as an explanation of how judicial decisions are made.

It is not difficult to criticize positions so lucidly extreme. Pound pointed out that while legal realists contend that as a matter of fact judicial decisions are not based on logic, they are still concerned to make the normative statement that judges should disregard stare decisis which can only impede the legal system; by making the normative statement the truth of the first is denied, for if legal decisions were actually based on factors other than logical deduction from rules the warning to judges to disregard stare decisis would be unnecessary.¹⁶

Kantorowicz criticizes the legal realists for

failing to account for the normative aspect of law. In his opinion, it is mistaken to attempt to study social phenomena without regard for the rules governing them. Exclusive concern with the results of litigation distorts the law by ignoring its function as a normative guide for behavior.¹⁷

Hart raises a similar objection against the "predictive view" in The Concept of Law. The predictive theory, he says, cannot account for the internal aspect of law, i.e. for the function of law as a standard for behavior and a basis upon which deviants may justly be criticized.¹⁸ Without internal acceptance there could be no prediction, he contends.

The criticisms of Hart and Kantorowicz show only that legal realism does not completely account for all aspects of law; they do not demonstrate that the claims of the legal realists are totally misguided. It is possible to argue that much of what the legal realists claimed is important to understanding the causal factors of law-obedience and adjudication, although it is irrelevant to justifying a legal act or decision.

Contemporary philosophers have maintained the necessity of distinguishing between the causes of a decision or act and its justification.¹⁹ Cause is concerned with how the act was done or the decision was made;

justification is concerned with why it was done or made. Where how one did something led to an undesired result, one offers an excuse: "I dropped the book because my elbow was pushed". Where the question is why one did something, one asks for reasons justifying the conduct: "I hurt his feelings because it was necessary to tell the truth."

The legal realists with their concern with the psychological factors affecting judges, the motives, biases, prejudices and hunches of the judiciary, were clearly concerned with the "how" or the causal aspect of the judicial decision. And there may be some truth in saying that the deductive process and application of rules do not explain how, as opposed to why, certain decisions are made. Their mistakes were two: first, they treated causal factors as the whole of the problem of explaining the judicial decision without acknowledging the importance of justification, in which rules and deductive procedures play an important part; secondly, they were too extreme in some cases in excluding rules altogether from the explanation of the causal aspect of law-obedience and the judicial decision--rules play an important part in the causes for most judicial decisions, even though other factors may be important.

A recurrent theme in the legal realists' discussions

of the causal factors of obedience to the law and particularly, the judicial decision, is that the picture of a judge or a person contemplating a legal decision by sitting down, searching out the applicable rule, drawing the conclusion and deciding without further reflection does not meet the realities of the way people obeying the law and judges deciding cases under the law, behave. This is one of the more important reasons given for rejecting rules altogether as an explanation of how legal decisions are made.

It is arguable that had the legal realists had a more accurate picture of rule-following behavior, they would never have concluded that rules did not represent the realities of the way people act. Recent philosophical interest in rules has resulted in jettisoning the picture of conscious, rational, deliberate deduction, presented above, as typical of rule-following behavior.

Based largely on the work of Wittgenstein,²⁰ the concept of rule-following as a matter of acting rather than a two-step procedure involving rational thought, then action, has gained acceptance. Meiden states:

. . . to follow or obey a rule is not to repeat to oneself what the rule requires, reflect upon the situation in which one finds oneself in order to determine that it is the one to which the rule applies, and then decide to obey it. Such an account, if it were true, would only serve to create doubt that the person in question had learned the

rule, for at best it could only describe the learner's fumbling, hesitating procedure.²¹

When one knows a rule, it is in most cases unnecessary to reflect on the rule and its application; one simply acts in accordance with it. For example, when driving a car one stops at a red light without consciously thinking of the by-law that makes such conduct necessary. Similarly, the fact that a judge did not rely on conscious deduction from a formulated rule in arriving at his decision (although he may have made such deduction part of his "judgment", or justification), does not mean that he did not rely on the rule, or decided on the basis of "hunch", "intuition", "prejudices" or personal impressions of the parties, as the legal realists have suggested.

In cases, however, where the rules are general and precedent lacking so that it is difficult to decide whether a particular case falls under a particular rule, the custom of acting in a certain way which on Wittgenstein's view makes normal rule-following dependent will be lacking. Thus in these cases, or in the case of one learning a rule, some conscious process of bringing the rule to mind and deducing the conclusion from it must be present. These are the difficult cases, involving conscious weighing of the scope of the rule and the nature of the situation at hand.

If Wittgenstein's view of normal rule-following behavior is correct, then customary or habitual behavior has a large part in explaining how people follow and obey rules. Hart, it will be recalled, in rejecting Austin's conception of law as orders backed by threats and supported by a habit of obedience to the sovereign, rejects the role of habit in law-obedience. Habitual behavior, in his opinion, cannot account for the continuity in law, nor for its normative force and internal aspect, it has been seen. Although Hart may be correct in concluding that mere habitual behavior cannot account for law-obedience, he errs in thereby excluding habitual behavior from his account of law.²² As has been argued, habitual behavior, conceived in conjunction with rules rather than in contrast with them, as Hart conceives them, plays an important role in explaining the causal aspect of obeying and rendering decisions on the law.

4. Rule-Supplementation

Between the deductive picture, which interprets the processes of following and adjudicating the law exclusively in terms of rules, and rule scepticism, which denies the role of rules in these processes entirely, lies the position which may be called rule-supplementation--the view that while most decisions can be accounted

for in terms of deduction from general rules, to explain all decisions, rules must be supplemented with other elements.

Aristotle held that rules of law must be supplemented by equity:

What creates the problem is that the equitable is just, but not the legally just but a correction of legal justice. The reason is that all law is universal but about some things it is not possible to make a universal statement which shall be correct. In those cases then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. . . . When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by over-simplicity, to correct the omission--to say what the legislator himself would have said had he been present, and would have put into law if he had known.²³

Aristotle is saying two things: (1) Particular cases may arise which, because of the law's generality, are not covered by a rule of law; (2) In these cases, people seeking guidance for action and judges rendering decisions must act creatively and choose the course which the legislator, had he foreseen the situation, would have chosen. With respect to the first statement, Wasserstrom has pointed out that it is theoretically possible to formulate rules of sufficient particularity to cover every situation, and that the impossibility of formulating rules for every situation is a practical one.²⁴

Hart agrees that the difficulty is a practical one

arising from the need for the application of law to many situations and our inability to foresee all possible situations which may arise.²⁵

Another example of rule supplementation is Dean Roscoe Pound's analysis of law into three elements: (1) general, precise rules which provide definite, detailed legal consequences for definite, detailed sets of facts; (2) standards, such as "due care" in negligence, so general that they allow wide scope for variation with the individual case; (3) ideals, by which judges are guided in determining whether general standards have been fulfilled or not.²⁶ While rules explain the stability and certainty characteristic of most of the law, the variability of standards in accordance with ideals accommodates the ability to grow and change through broader or narrower interpretations of judicial precedents and statutory rules.

The influence of Pound's view may be detected in Hart's distinction in The Concept of Law between the rule-governed operations of the core area of law and decisions in the penumbral area where standards and judicial discretion govern.²⁷

All three views of rule supplementation which have been considered suffer from the failure to explain exactly where rule-governed operations become ineffective.

and supplementation begins. Aristotle speaks of the point where there is no general rule applicable to the particular situation. This is difficult to understand, for where there is no rule expressly enjoining certain conduct, that conduct will be permissible as far as the law is concerned. For example, upon repeal of the homosexuality law of England, homosexuality was no longer a legal offense. What Aristotle more probably had in mind was the situation where no rule precisely identifies the situation as falling under it, with the result that the conduct under consideration may or may not be an offense or may fall under any one of two or more rules each of which might dictate a different decision. But if this interpretation is accepted, we are then faced with the problem of how the decision of whether a factual situation falls within the rule or not, or which of several rules best characterizes the situation, can be construed as "correcting" the oversight or error of the legislator. It may be argued that it is not the legislator who is at fault in such cases, but rather the characterization of the factual situation at hand as one thing or the other. Moreover, how can the procedure of deciding whether a situation falls under a given rule or which of several rules should be applied be characterized as the addition of another element to law upon the failure of

rules to cover the situation in question? If equitable discretion is involved, is it not as a factor inherently necessary to the application of rules rather than a replacement of rules by equity?

Pound's and Hart's distinction is not between rules and equity, but between rules and general standards. In both cases, the distinction offered between rules and standards is the fact that rules apply to precisely defined situations while standards are more general, allowing latitude for judicial discretion. To this it may be objected that there are more precise and more general rules and that some standards, too, can be more precise than others. In the case of a man deliberately driving with his eyes shut, for example, the standard of due care might allow no more latitude for judicial discretion than the most precise rule. If this is the case, Hart's distinction between the core area of law where rule-governed operations account for law-obedience and adjudication, and the penumbral area where "variable standards" govern seems weak indeed.

In view of the difficulties associated with drawing a rigid distinction between those areas of the law governed by rules and those governed by other elements, it would seem that another explanation of the greater scope for judicial discretion in some areas than

others is called for. It can be argued that an altered conception of rules can explain within the framework of rules both the elements of certainty and change by judicial discretion in the law.

Rules apply generally to classes of people and courses of conduct. Some rules are more particular than others. Those which are fairly detailed in their statement of the conduct to which they apply leave little room for uncertainty. The more general rules, however, possessing a greater degree of "open-texture" and fewer concrete expressions of where they apply, allow more scope for judicial interpretation; for example, a judge may construe "due care" either narrowly or broadly. But on occasion, even precise rules may be subject to judicial interpretation, since even concrete words can have an area of open texture. For example, the prima facie precise rule "No vehicles in the park" may raise difficulties related to the meaning of "vehicle" and "in the park".²⁸ Does an antique car on display violate the rule? Does an airplane caught in the tree-tops infringe it? Thus the judge's conception of the purpose of even a concrete rule might well determine the outcome of the case.

The conclusion to be drawn from the foregoing remarks is that while depending on their generality some rules allow more scope for judicial discretion than

others, even concrete rules can in unusual circumstances admit of flexibility and discretion. Flexibility, judicial discretion, and judicial creativity would seem to be characteristics of the way all rules can sometimes be used. While there may be a distinction between certain laws which are more determinate than other laws, surely it is wrong to characterize the determinate area as alone governed by rule-following behavior and the less determinate as governed by standards. A more apt picture might be a scale, with "standards" as the most general type of rule at the top and the most precise rules at the bottom. Such a view would acknowledge that allowance for a greater or lesser degree of open texture and room for judicial discretion must be made in all rules, and that the difference is one of degree only.

The result is a rejection of rule-supplementation as a valid explanation of the processes of law-obedience or adjudication. Discretion is conceived as part of rule following, rather than as an element supplemental to it. In so far as Hart's core-penumbra distinction represents a distinction between two different ways of deciding cases it too must be replaced, if the argument is accepted that the judicial decision can be best accounted for by the varying scope for discretion allowed by different legal rules.

5. Conclusions--An Altered Approach.

Having considered some merits and defects of rule formalism, rule scepticism and rule-supplementation, it becomes necessary to correlate our observations on each position and attempt to formulate a final view of the processes of obeying and adjudicating the law.

A complete explanation of these processes must explain both the aspects of how a decision is made and why it was made; both causation and justification must be discussed. The error of rule formalism is to concentrate exclusively on justification, while the legal realists emphasized the causal factors of judicial decision to the exclusion of all others. Since the explanation of the cause of a certain act or decision might be quite different from its justification, the two must be given separate attention.

With respect to the causes of a legal act or decision, it will be recalled that here the psychological, non-rational elements emphasized by the legal realists may be accommodated. In so far as hunches, biases, and prejudices play a role in legal acts and judicial decisions, it is with respect to how judgments are made rather than their justification. At the same time, the legal realists do not give sufficient place to the role of rules in explaining the causes of law-obedience and

adjudication. Their derogation of rules was the result of their conception of rule-following as involving a conscious, mental act prior to the physical act of following the rule. If it is accepted that rule-following does not necessarily involve a separate mental act, but more closely resembles a spontaneous reaction to a recurring situation, rule-following may be conceived as the cause of acts and decisions where there is no conscious formulation of a rule and deduction from it. In the case of a learner or unusual or novel situations, conscious, deliberate reflection may be the effective cause of decision. In these cases, the following discussion of justification of a decision will apply, the same logical processes being involved in both cause and justification.

The justification of either an act or a judicial decision deals with two factors: (1) determination of premises of fact and law; (2) deduction of the conclusion from these premises. While the deductive process is not the whole of the law, it serves as the framework in which justifications of legal decisions are typically cast.

Two premises must be determined--one of fact, characterizing the situation in question, the other of law. The major premise, which states the applicable law, may be derived from common law or from statute. Where

the matter is governed by common law, the rule must be determined from an analysis of previous cases in which it was applied. There are various views as to how the rule is extracted from previous cases but it is generally conceded that at the very least, it must involve reference to the facts of those cases in relation to the decisions rendered.²⁹ Often, in practice, the rule as stated in a previous judgment will be cited. The procedure is basically that of reasoning by analogy; one looks to see what the law was held to be in situations similar to the one at hand. It is also a process of induction; one looks to many cases, noting similarities and differences. Even in the case of statute law, the scope, effect, and meaning of the major premise is influenced by other decisions under that statute or similar statutes or by cases setting forth rules of statutory construction.

The fact that rules of law are often subject to numerous exceptions or "defenses" complicates the statement of the major premise, it would seem. For example, to properly state the rule against killing people, it would be necessary to qualify it by the exceptions of self-defense, insanity and acts authorized by the state, e.g. executions, war. Hart explains these exceptions as conditions which "defeat" the operation of the rule.³⁰ As a matter of practice, the complication of exceptions,

or defeating conditions, is not a problem, since the rule is cited in the context of a particular fact situation where the issue of exceptions not touching that situation does not arise. To preserve the validity of the major premise in the deductive syllogism without listing all exceptions, it may be regarded as an elliptical statement with exceptions omitted until the appropriate situation arises.

The minor premise of the syllogism is concerned with establishing that the situation under consideration falls under the rule of law indicated by the major premise. The reasoning here too is inductive and can involve analogy. One's characterization of a particular fact situation is likely to be influenced by the way similar situations have been characterized in the past.

In the fact that the premises of the justification of a legal decision are based on non-deductive reasoning concerned largely with analogy and on perception of fact situations, lies the key to reconciliation of the apparent certainty and generality of law with the facts of judicial discretion and growth and change of the law. It was argued earlier that even in fairly determinate rules³¹ there might in unusual cases be scope for judicial discretion and that therefore flexibility based on the open-textured nature of language and relative indeterminacy of

aim should be considered a characteristic of rules rather than an additional element of law. Analysis of the way the premises of the legal syllogism are determined explains the sources of this flexibility. Depending on what the purpose of a law is conceived to be, it may be stated more broadly or narrowly. Similarly, a judge may justify his choice of premises by reference to an ideal, or his conception of the social good. An individual justifying an act might use the same arguments. (It is to be noted that in so far as reasoning is the cause as well as the justification of a decision the same considerations apply.)³²

Levi sees this freedom of judges to choose their own premises as invalidating the deductive model as applied to law:

. . . by common standards, thought of in closed (deductive) systems, it is imperfect unless some overall rule has announced that this common and ascertainable similarity is to be decisive. But no such fixed prior rule exists. It could be suggested that reasoning is not involved at all; that is, no new insight is arrived at through a comparison of cases. . . . But reasoning appears to be involved . . . It seems better to say there is reasoning but it is imperfect.³³

Because of this alleged defect of reasoning by analogy by which the premises of the syllogism are determined, the fallacy of the undistributed middle, or assuming the antecedent true because the consequent has been affirmed, has been committed, it might be argued. If a judge or

an individual can choose whatever premises he likes, the justification based on these premises becomes worthless.

The answer to this objection lies in the fact that neither individuals obeying the law nor judges interpreting it are free to choose premises to any great extent. They are bound by rules enunciated in preceding cases and statutes. Even in the case of very broad rules such as that enunciating the duty of due care, case law has severely limited the scope for judicial creativity, particularly in the lower courts which are bound by a great number of superior decisions. Thus despite the correctness of Levi's observation that the deductive system in law is not closed, there being no external rule for the choice of premises in all cases as in, for example, science, and despite the fact that judges admittedly sometimes interpret rules of law and fact situations with a view to obtaining the end desired, the freedom is not so unrestricted as to make most legal decisions arbitrary. Moreover, it can be urged that some measure of freedom to choose premises in order to obtain the desired result, while vitiating in science where conclusions of fact are desired, may be necessary in law where the conclusion is the evaluation of conduct. It can provide a limited scope to adjust the decision to the equities of the case, or prevailing moral views, for example.

Thus in justifying their choice of premises, judgments may expressly allude to principles of justice, fairness or morality.

Once the premises of fact and law are established, the conclusion may be deduced from its premises. Thus the deductive model of rule formalism is accommodated.

The foregoing explanation of the causes of and justifications for law-obedience and the judicial process is directed towards accounting for the way in which the certainty and generality characteristic of much of the law is to be reconciled with the presence of a degree of judicial discretion and capacity for change in the law through judicial decision. At the same time, it is hoped that some of the difficulties associated with rule formalism, rule scepticism, and Hart's form of rule supplementation may thus be avoided.

The result is a conception of the legal process which synthesizes elements of the deductive theory, and of the thinking of the legal realists, with Hart's very important concept of the open-textured nature of law and its relation to judicial discretion. While owing much to Hart's view, it differs in three important ways. First, it distinguishes between the quite different matters of the causal and justificatory aspects of law. Secondly, it replaces the difficult distinction between

the core and penumbral areas of law with a broader concept of rules which allows a varying amount of flexibility and discretion to be an inherent aspect of rule application rather than a distinct element. Finally, the view presented distinguishes between two types of reasoning involved in justification--and sometimes in explaining the causal factors--of a legal act or decision: reasoning by analogy to determine premises, and deductive reasoning from premises to conclusion. This allows reconciliation of the prominence of allusions to deductive logic, certainty, and generality in judgments and legal literature, with the fact that there is scope for a limited amount of discretion in arriving at a decision.

CHAPTER FOUR

Having completed analyses of two most important features of law in terms of rules, namely the mandatory force and the processes of law-following and judicial decision, it is appropriate to examine the distinctions between types of rules made in The Concept of Law. Our concern will be not only with the validity of the distinctions drawn by Hart, but with whether the types of rules he presents can together account for at least the salient features of a legal system.

The most basic distinction drawn by Hart is between duty-imposing and power-conferring rules. It would seem that this distinction is identical to that drawn between primary and secondary rules. Referring back to his earlier distinction between duty-imposing and power-conferring rules, Hart says:

Under rules of the one type (duty-imposing) which may well be considered the basic or primary type, human beings are required to do or abstain from certain actions, whether they wish to or not. Rules of the other type are in a sense parasitic upon or secondary to the first; for they provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones or in various ways determine the incidence or control their operations.¹

This passage indicates not only the parallelism of the two distinctions, but the basis upon which they are drawn.

Hart rests his distinction between duty-imposing and power-conferring rules chiefly on two differences. First, power-conferring rules, unlike duty-imposing rules, do not impose duties or obligations, but rather facilities for the realization of wishes. Secondly, the consequences of breach of duty-imposing rules are typically sanctions, or some sort of punishment, while those of failure to conform with the requirements of power conferring rules are merely nullity, or failure to attain the end to which the conduct was directed.² The two types of rules are alike, we are told, in that both prescribe standards for conduct.³

The distinction between primary, duty-imposing rules and secondary, power-conferring⁴ rules raises some difficulties. The first relates to the mandatory force of the two, or what makes each of them "binding". Although Hart says power-conferring rules cannot impose obligations, he treats them as gaining their normative imperative from "internal acceptance" in the same manner as duty-imposing rules.⁵ Indeed, internal acceptance is the sole source of the mandatory force of power-conferring rules since they are not supplemented by the sanctions of duty-imposing rules.

Yet, we saw in the preceding chapter, there seems to be an important difference between the way a duty-

conferring rule and a power-conferring rule are "internalized". Acceptance of a power-conferring rule does not constitute acceptance of a standard of conduct thought of by the community as constituting a minimum of acceptable behavior and regarded as a basis for the justifiable criticism of breach, in the way acceptance of a duty-imposing rule does. The community is likely to be indifferent toward failure to conform to the requirement that a will be witnessed; only the individuals named as beneficiaries would be likely to criticize. And even then, criticism would be directed not so much at the wrongfulness of the act as the failure to achieve the desired end.

Chapter II's discussion of the mandatory force of law, it will be recalled, distinguished between duty-imposing and power-conferring rules of law on the basis of the different types of official consequences which follow the acts proscribed or prescribed. Negative sanctions follow breach of duty-imposing rules, while the advantages of new rights and obligations follow conformity with power-imposing rules. The former can be properly called duty-imposing rules only when backed by moral obligation. In these cases, internal acceptance may mean acceptance of the conduct prescribed as good in itself, while acceptance of a power-conferring rule can only be acceptance of the "condition"

which proper conduct will bring about.

It will be recalled that while both duty-imposing and power-conferring rules qua rules of law take the form of the conditional imperative, the former may be backed by moral duties or obligations whose mandatory force is independent of any condition of either sanctions or promised rewards. Obligations of a moral nature may also supplement the exercise of legal powers, as in the case of the power to legislate or adjudicate, it was there pointed out.

Until we understand that Hart has conflated duty-imposing rules and moral obligation, it is difficult to analyze the difference between internal acceptance of duty-imposing rules and power-conferring rules. If this explanation of what Hart has done is accepted, however, it becomes clear that the reason duty-imposing rules seem to be accepted as standards good in themselves while power-conferring rules are accepted as good only in relation to desired ends, is that internal acceptance of duty-imposing rules is really moral approbation which sees the act as good in itself. If the duty-imposing rule is regarded externally, that is, amorally, the conduct prescribed is good only in relation to a desired end, as is the case with power-conferring rules.

A second problem relating to the distinction

between primary and secondary rules concerns the status of private power-conferring rules. It has been noted that Hart seems to equate the term "duty-imposing" with "primary" and "power-conferring" with "secondary". Thus secondary rules would seem to include both public and private power-conferring rules, both rules concerned with the public recognition and enforcement of law, and rules enabling individuals by certain acts to enter into certain legal relationships with others.

Yet Hart's description of secondary rules does not seem to fit the characteristics of private power-conferring rules. It is difficult to see the sense in which a rule allowing a will to be made upon compliance with certain requirements is "parasitic" on a primary rule or rules. Hart describes secondary rules as rules by which people "introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations."⁷ The only manner in which private power-conferring rules fall under this description is by considering the making of a will, for example, as a rule determining the incidence or operation of the law of intestacy. The context, however, suggests Hart had in mind the ways in which official operations, such as legislation or adjudication, determine the incidence and operation of laws. And even

were private power-conferring rules allowed to fall under Hart's description of secondary rules, this fails to offer any explanation of how they are parasitic or secondary to primary rules. The difficulty of classifying private power-conferring rules as secondary rules becomes even greater if Hart is understood as saying that all secondary rules must fall into one of the classes of rules of recognition, change and adjudication.⁸

This poses a dilemma: Private power-conferring rules cannot be considered secondary rules without doing violence to the concept of secondary rules as rules "about" and "parasitic on" other rules. Yet they must be considered secondary rules if they are to be included in Hart's description of the essence of law as a union of primary and secondary rules. As Morris puts it:

There are rules that are not about other rules and that do not impose duties--for example, a rule conferring the power to issue subpoenas. How is such a rule to be classified?⁹

A second difficulty associated with Hart's primary-secondary distinction is raised by Morris; if secondary rules are rules about other rules it seems necessary to provide, not just two, but many categories of secondary rules in order to accommodate secondary rules about secondary rules ad infinitum.¹⁰

Singer has pointed out that Hart's identification of power-conferring and secondary rules conceals important

differences between the two. For example, the rule of recognition, a secondary rule, determines the validity of private power-conferring rules. To reduce them to one class is misleading reductionism.¹¹

Furthermore, it has been contended that Hart's account of law as a union of primary and secondary rules does not clearly account for many elements of law such as rules of evidence, procedure, presumptions and the burden of proof.¹²

These difficulties can be avoided, it is suggested, by replacing the distinction between primary and secondary rules with that between procedural and substantive rules. The problem of the status of private power-conferring rules is solved by placing them in the category of substantive rules. The possibility of an infinite regress of secondary rules raised by Morris disappears with the substitution of the single category of procedural rules for secondary rules. Nor are the differences between public and private power-conferring rules masked under the rubric of a single category; the former are considered procedural, the latter substantive. Finally, rules of evidence, procedure, presumption and burdens of proof fall clearly within the class of procedural law.

Within the class of secondary rules, Hart

distinguishes three types of rules important in a legal system: (1) rules of recognition; (2) rules of change; (3) rules of adjudication. These rules, says Hart, must be internally accepted by the officials of the legal system, since there are no sanctions imposed by a higher authority on the officials of the group. In making this a condition of the existence of a legal system, Professor Hart implicitly acknowledges that the expectation of official action of a certain kind is necessary to making the primary rules meaningful as law, a point which he has been accused of not making clear.¹³ However, Hart's requirement of acceptance of these secondary rules by the officials of the system is not without difficulties. As was pointed out earlier,¹⁴ acceptance alone does not fully explain the mandatory force behind such rules. Graham Hughes points out that officials may do their duties for many reasons, including fear of criticism or removal.¹⁵ It is difficult to distinguish "acceptance" of secondary rules on this basis from rejection accompanied by obedience out of fear of sanctions in the case of primary rules. It has also been seen that moral conditions of duty and obligation binding those entrusted with power to change or adjudicate on the law must be added to the acceptance of powers to fully account for the relation of officials to secondary rules.¹⁶

Of the three types of secondary rules, the rule of recognition merits special attention. The rule of recognition comprehends a complexity of rules setting forth the conditions for the validity of laws. It is Hart's view that because of the hierarchical structure of these rules, e.g. precedent, is subject to legislation, they can be integrated logically into only one rule. This rule of recognition identifies primary rules of obligation as rules of the legal system. Unlike Kelsen's "prime norm" it is not hypothetical, but exists as a matter of empirical fact. While Kelsen's prime norm, which is "simply the rule that the constitution or those 'who laid down the first constitution' ought to be obeyed",¹⁷ is the "presumed" condition of validity of all legal systems, the rule of recognition varies from state to state according to the conditions of validity actually set. Once a rule is accepted as valid on the basis of the criteria provided by the rule of recognition, it is redundant to say that it ought to be obeyed, according to Hart. While for Kelsen acceptance of the prime norm entails moral acceptance of a duty to obey the law, Hart says that it is quite possible to accept a rule as valid on the basis of the rules of recognition and still feel that its demands are morally wrong.¹⁸ The rule of recognition as conceived by Hart is a factual datum independent

of normative considerations. Hart states that his purpose in so conceptualizing the rule of recognition is to avoid the collation of law and morality found in Kelsen's treatment of the prime norm.

Hart's concrete conception of the rules of recognition would seem to be an important advance. There is little understanding of legal systems as they are to be gained by postulating a hypothetical norm of acceptance. It would seem, too, that Hart is right in separating the problems of formal identification of a rule as valid law and the acceptance of a moral duty to obey the law. However his statement that once the rule of recognition has established the validity of a rule of law, "it seems a needless reduplication to suggest that there is a further rule to the effect that the constitution (or those who laid it down) are to be obeyed,"¹⁹ seems open to question. Hart himself seems to admit that the problems of legal validity and of whether the law ought to be obeyed are distinct when he says that in certain cases, one ought not to obey a valid law,²⁰ or when he says that "it may well be that any form of legal order is at its healthiest when there is a generally diffused sense that it is morally obligatory to conform to it."²¹ The question of a moral duty to obey the law, while not incidental to the rule of recognition, will be discussed in the context

of the relation of law and morality.

Despite these apparent advantages, Hart's conception of the rule of recognition has provoked some criticism. Since it is a factual datum, it is subject to attack on the ground that the qualities ascribed to it are not empirically substantiated; thus Ross asserts that the claim that the various rules of recognition form a hierarchy which constitute a single rule of recognition "squares better with a confessed, official ideology than with facts."²² More serious are the criticisms expressing the fear that to reduce the rule of recognition to a question of fact is to leave out important aspects of the concept of legal validity. Fuller rejects Hart's rule of recognition as a matter of sociological fact,²³ and Singer contends ". . . the question of whether a law is valid is a question of law and not a question of fact." In Singer's opinion, Hart's description of the rule of recognition found in the general practices of officials, is inadequate, since a practice cannot require or prohibit conduct or be broken.²⁴

Clarification of these issues rests in a better understanding of what Hart means when he says that the rule of recognition is a matter of fact. Fuller and Singer seem to assume that what is meant is that the validity of law rests in arbitrary official practice

rather than the rule of law. If so, this is a misreading of The Concept of Law. Hart's point is that the validity of the rule of recognition depends on the fact of its acceptance by the officials applying it. A distinction must be drawn between the question of the existence of a norm of validity and that of its content. Unless it is, as a matter of fact, accepted as the appropriate standard for validity by those applying it, it does not exist as a standard of validity for laws of the system. Its existence as a standard cannot be further explained, as the analogy of the standard metre bar in Paris (which Hart borrows from Wittgenstein's Philosophical Investigations)²⁵ illustrates. Once accepted, however, the content of the rule of recognition is a matter of law, which cannot be varied arbitrarily by official practice. Thus official practice may be in breach of the accepted norm of validity of the system. The rule of recognition may be characterized as a rule of law resting on the fact of official acceptance.

A less fundamental difficulty associated with the rule of recognition is indicated by Cohen's²⁶ statement that "The rules [Hart] calls rules of recognition are not rules that confer powers, whether public or private: they set up criteria. They determine the sources of the law; they do not give power to someone, to make

it, like the rules that Hart calls rules of change." He argues that, for example, if the writings of a man posthumously become accepted as valid law, it is absurd to suppose that the rule of recognition gives the man powers of legislation. To this it may be replied, first, that the rule of recognition generally confers legislative powers although there may be exceptions to this, and secondly and more importantly, that the powers it conveys are powers not to legislators only but to judges and other officials concerned with enforcement of the law to take certain actions in case of breach of a rule it designated as valid.

In addition to distinguishing types of rules, Hart distinguishes rules from other closely related phenomena--orders, standards, and ideals.

The distinction between orders and rules is made in the course of Hart's arguments against orders and for rules as an explanation of law. While rules, like law, apply to classes of persons and courses of conduct, orders apply to individuated acts. While rules, like law, are of an enduring nature, orders are temporary one-time imperatives. Rules, like law, apply to the person making them as well as to others; orders do not usually apply to the orderer. Some rules, like law, come into being out of custom, but orders must be deliberately made.

Finally, orders cannot accommodate power-conferring rules, an important part of law.²⁷

So impressive a list needs no comment, save for one qualification. Hart's failure to accord orders a significant role in his concept of law is surely too drastic. While Hart admits that orders by officials are found in a legal system, he says that they are not the "standard" way in which law functions and have only a "secondary" place in law.²⁸ In fact, however, orders may play a role in a legal system which is neither abnormal nor secondary. In those countries where "the rule of law" prevails, the principle that action cannot be taken by public officials against individuals except under duly passed laws is found ; this provides recognition of the fact that the orders of officials should be based on or related to a rule. However, where this principle is not recognized, independent orders may play a more important part in the legal system. Even in systems which recognize the rule of law, the growth of administrative aspects of government mean that officials are given discretion to make orders which may be related to a rule of law only indirectly.²⁹ Thus orders have a place: (1) in all systems, as instances of the particular application of a general rule; (2) in those systems where the "rule of law" principle is not recognized,

independent of rules.

Difficulties associated with Hart's treatment of standards have been pointed out by Morris.³⁰ He indicates three different and incompatible uses of "standard" in The Concept of Law. Hart refers to the proposition that a man should take off his hat on entering a church once as a "standard"³¹ and again as a "standard" and "rule".³² The third use is in the context of the discussion of the open-textured nature of law, where Hart treats a rule and a standard as two different things.³³

In the face of these incompatible statements, Morris suggests that it would be better to limit the use of the word "standard" to legal phrases such as "due care" and "reasonable caution". He conceives these phrases as being non-normative, in that they do not impose particular acts on anyone. Where a particular act is prescribed or a duty said to exist, this must be attributed not to the standard but to the rule incorporating the standard, according to Morris. Further differences are that while rules involve subsumption and deduction, standards involve weighing, and that while standards admit of degrees of fulfillment, rules are either obeyed or not obeyed.

Morris' reconstruction presents difficulties of its own. First, his statement that a standard cannot impose any conduct or indicate appropriate acts seems to

leave it void of meaning; what is "due care" if not an indication of what constitutes acceptable behavior? Moreover, his statements that standards involve "weighing" and are susceptible of "fulfillment" indicate a measurement of assessment of conduct; the difference between prescribing appropriate conduct and assessing appropriate conduct is difficult to understand. Moreover, it would seem that the demands of a rule can be exceeded in the same sense as a standard can be overreached; both admit of degrees of fulfillment. Rules as well as standards can involve weighing; this occurs in the process of enclosing premises, it was earlier concluded.³⁴

The difficulties of both Hart and Morris in distinguishing between standards and rules reinforce the conclusions of the previous chapter that standards are best considered as broad, general rules.³⁵

Finally, Hart distinguishes ideals from rules. While rules prescribe the minimum acceptable standard of conduct, individuals may set for themselves ideals which exceed these minimum requirements.³⁶ Hart, like most who have written on the subject, treats action in accordance with ideals as a form of moral action. As such, the concept will be discussed more fully in the next chapter.

* * * * *

At this juncture, a summary of the conclusions reached thus far on the role of rules in law may be attempted.

An examination of the mandatory force of law in Chapter II revealed difficulties in Hart's account of legal imperatives in terms of internal acceptance of rules. It was suggested that to properly account for what makes law binding, the normative force associated with morality must be distinguished from that associated with law qua law. Legal rules were found to take the form of the conditional imperative, their normative force being dependent on the threat of sanctions (duty-imposing rules) or the hope of benefits (power-conferring rules). In contrast, moral rules were conceived as deriving their normative force from obligation which in turn rests on a value judgment that the conduct is good in itself, independent of external threats or promises. The normative force of morality, thus conceived, supports that of law by providing an additional imperative where the content of law and morality overlaps and by fostering acceptance of a moral duty to obey the law.

Consideration of the processes of rule-following and judicial decision in Chapter III led to the conclusion that instead of distinguishing between a rule-governed "core" area and a discretionary "penumbral" area

of the law, it is more in consonance with the actual operation of rules of law to substitute a scale ranging from very precise to very general rules. The causal and justificatory aspects of decision making were distinguished; while psychological and sociological factors are relevant to explaining the causes of decisions, their justification depends chiefly on reasoning, it was concluded. Justification typically takes the form of inductive reasoning to determine the premises (thus allowing for limited judicial discretion) and deductive reasoning from the premises to the conclusion.

Having established that two basic features of law, its mandatory force and the processes by which it is followed and adjudicated, are explicable in terms of rules, thus securing for rules a central place in the concept of law, an analysis of Hart's distinctions between types of rules and between rules and other elements was undertaken. Problems associated with the conception of law as the union of primary duty-imposing rules and secondary power-conferring rules led to the conclusion that two distinctions are necessary--one between duty-imposing and power-conferring rules and the other between substantive and procedural rules. It was suggested that in some legal systems orders may play a larger role than Hart allows them. As for Hart's ambiguous treatment of

standards, difficulties are terminated if they are viewed as very general rules in accordance with the suggestion of Chapter III. The place of ideals in law was set aside for further consideration in the context of morality.

Our investigation thus far suggests that while Hart's account of law in terms of rules suffers from certain defects, it is possible with revision to arrive at an explanation of law based on the concept of rules which is both defensible and enlightening.

CHAPTER FIVE

Hart's thesis that law is essentially the union of primary and secondary rules is not secure until defended against arguments claiming that morality is of such importance in law that it must feature centrally in an account of a legal system. Thus Hart discusses the relation of law and morality to the end of showing that there is no necessary connection between the two. Prior to an examination of the relation between law and morality, it is necessary to characterize the similarities and differences between law and morality.

In Chapter VII of The Concept of Law, Hart discusses the respective characteristics of law and morality. His account, unfortunately, is in some respects summary, which may account in part for Summers' comment that "Hart does not compare and contrast law and morality".¹ This chapter of the essay will attempt a critical examination of Hart's account of morality in comparison with law. In the course of the discussion, we will draw on the conclusions of earlier chapters.

1. Justice

Justice constitutes one segment of morality primarily concerned not with individual conduct but with

the ways² in which classes of individuals are treated.

The first notable thing about this quotation is the view that justice is a "segment" of morality. It is not the characteristic or by-product of a moral legal system in general, but refers to one segregated aspect of morality, which in turn is concerned with a certain limited aspect of the law.

The role which Hart allows justice is indicated by the second part of the quotation; justice is concerned to ensure that individuals who are the members of a class are treated equally. For example, it is generally felt that all individuals "are entitled in respect of each other to a certain relative position of equality or inequality. . . . Justice is thought of as maintaining or restoring a balance or proportion."³ The basic principle of justice is the treatment of like cases alike and different cases differently.⁴ This means that what is considered "just" or "unjust" may ultimately depend on classification, on what similarities and differences are considered material.⁵

Justice, according to Hart, may be ascribed either to particular laws, or to the manner in which they are applied.⁶ Thus a law discriminating against negroes may be said to be unjust, as may a law which

applies to all regardless of class but is unjustly administered.

Hart distinguishes two types of justice: "distributing" justice and "compensating" justice.⁷ The former refers to equal distribution among individuals of burdens and benefits; the latter refers to compensation for injury done by one person to another. It is easy to see how the principle "treat like cases alike and different cases differently" applies to distributive justice. But the principle's link with compensation is more difficult to make out. Hart admits that the link is less direct.⁸ He argues, however, that the structure of reciprocal rights and obligations which constitutes the basis of the morality of every social group, creates "among individuals a moral and, in a sense, an artificial equality to offset the inequalities of nature. . . . Hence the strong man who disregards morality and takes advantage of his strength to injure another is conceived as upsetting this equilibrium, or order of equality, established by morals; justice then requires that this moral status quo should as far as possible be restored by the wrongdoer."⁹

Hart's concept of justice is closely related to his thesis that law is basically a matter of rules:

The connexion between this aspect (applying a law to all alike) of justice and the very notion of

proceeding by rule is obviously very close. Indeed, it might be said that to apply a law justly to different cases is simply to take seriously the assertion that what is to be applied in the different cases is the same general rule without prejudice, interest, or caprice.¹⁰

The account of justice in The Concept of Law has been criticized on at least one particular point and on several general issues. The particular point is Hart's theory of compensating justice. Robert Summers argues the principle "treat like cases alike" cannot without distortion explain why we speak of laws that provide or fail to provide compensation as "just" or "unjust". The basis for his claim seems to be that when lawyers speak of treating like cases alike they do not have in mind the preservation of a moral equality between the wrongdoer and victim, but rather other cases of either wrongdoers or victims.¹¹

If Summers' criticism is valid, as it would seem it is, then Hart would seem to be guilty of distortion for the sake of uniform categorization. However, his explanation of compensation based on the principle of a moral equality is not affected by Summers' criticism if the allusion to the principle "treat like cases alike", is deleted. Perhaps the principle relating distributive and compensative justice should not be that of treating like cases alike, but the fact that both maintain or restore a type of equality between individuals.

Turning to more general criticisms, it is to be noted that Hart's account of justice is basically Aristotelian. Aristotle, too, conceived of justice as the principle of equality, regulating relations between individuals. Hart's categories of "distributing" and "compensating" justice are remarkably parallel to Aristotle's categories of "distributive" and "corrective" justice.¹²

The Aristotelian concept of justice as adopted by Hart undoubtedly explains many of the ways in which the terms "just" and "unjust" are commonly used. It is questionable, however, whether they account for all of the common uses of these terms, that is, whether they offer a complete explanation of the concept of justice. As Summers points out:

We frequently say that a law is unjust even though it is uniformly applied, i.e. even though all cases are treated alike. Thus we say such things as: "Our penal code is unjust, for the prescribed punishments do not fit the respective crimes", and "This law is unjust because it restricts freedom to change jobs".¹³

Hart and Aristotle conceive of justice in procedural rather than substantive terms. As Hart puts it, justice is not concerned with individual conduct, i.e., particular substantive standards, but with the ways in which classes of individuals are treated.¹⁴ It can be argued, however, that justice has a substantive aspect, and that Hart's failure to account for it explains the

inability of his account to explain some of the common uses of "just" and "unjust". When we say that a criminal law is "unjust" because its penalties are too severe, or that a law forbidding all people any say in government is unjust, what we mean is that the content of that law denies people certain rights and freedoms which are thought of by the social group as minimal, it would seem.

The concept of substantive justice can be traced to the Platonic idea that justice was the opportunity for each individual to perform the tasks and share the privileges for which his capacities fit him.¹⁵ What one sees as meeting the requirements of substantive justice, (that is, meeting minimal requirements of individuals' rights and responsibilities) will vary with one's concept of human nature. Plato's ideal of a class society led him to find justice in denial of the equality of individuals and of individual freedom of choice, features which in our society may seem unjust. A capitalist-democratic view of human nature might see justice as allowing to all maximum freedom, fulfillment and opportunity. The principle remains the same, regardless of the concept of human nature applied: justice demands recognition by the legal system of the rights, freedoms, capacities and responsibilities which the prevailing moral consensus of a social group demands as minimal standards.

The foregoing analysis of justice has demonstrated the pitfalls of reductionism. Not only was it seen impossible to conceive all rules of procedural justice in terms of the principle "Treat like cases alike" without distortion; it proved impossible to account for all aspects of the concept of justice in terms of procedural equality. As Professor Honore has said:

Perhaps the greatest single obstacle to the analysis of the notion of justice is, indeed, the belief that a single formula can and must be found which will express a principle applicable to those various circumstances in which the allocation of advantages is in question.¹⁶

The expanded view of justice argued for above, which comprehends both procedural and substantive justice, may have important repercussions on one's view of the relation between law and morality, since in order to be just, laws need not only apply equally to individuals and be administered equally, but must comply with certain minimum moral requirements of content.

2. Morality (Exclusive of Justice)

In discussing the nature of morality, the distinction between the morality of duty and what is variously called the morality of "ideals",¹⁷ the morality of "aspiration"¹⁸ and the morality of "supererogation",¹⁹ must be drawn at the outset. The distinction will be defended presently; suffice it to say here that the

morality of duty concerns those minimum demands which society enforces by means of social pressure for conformity, while the morality of ideals concerns individual acts whose merit exceeds the minimum standard of conduct demanded by the community.

A. The Morality of Duty

Hart does not attempt an exhaustive analysis of the morality of duty, due to complexities of such a discussion which would take him beyond the scope of The Concept of Law. These complexities are the result of:

(1) the vagueness, or open-texture of the word "morality", giving rise to wide diversity of application and meaning; (2) disagreements as to the relation and status of principles of morality to the rest of human knowledge and experience.²⁰ Hart contents himself with a discussion of the similarities and differences between what he calls "the morality" of a given society or the "accepted" or "conventional" morality of an actual social group, and other forms of social rules, chiefly legal rules.²⁴ Special attention is given to the differences between moral and legal obligation. Hart emphasizes that he is not concerned with controversy over the source or explanation of moral principles; his aim is rather to elucidate features of moral principles as he observes them.²¹

Hart admits certain close similarities between legal and moral obligation. The basic element in the shared or accepted morality of the social group consists of rules of the kind which Hart postulates to explain legal obligation. Indeed, we are told, at primitive stages there may be no difference between legal and moral rules. In all societies there is a partial overlap of law and morality. Law and morality share a common vocabulary of "rules", "obligations", and "duties". Both are concerned with what is to be done or not to be done in circumstances constantly recurring in the life of the group, rather than in rare or intermittent activities on isolated occasions. Both require either forbearances or actions which are simple in the sense that no special skill or intellect is required for their performance. Compliance with both is taken as a matter of course, attracting censure for breach but no praise for conformity. Both are binding regardless of consent of the individual involved. Finally, both law and morality make certain fundamental demands which must be present where any group of human beings succeed in living together.²²

Differences between morality and law, which Hart treats as synonymous with differences between moral obligation and legal obligation, are more difficult to

formulate, we are told. In order to explain the seeming "internality" of morality relative to the "externality" of law, he introduces four differences between law and morality.

The first difference Hart introduces is that moral rules are, or are thought to be, of great social importance, while the importance of laws depends on the whim of the legislator. Secondly, it is pointed out that moral rules, like traditions, are immune from deliberate change; one cannot remove them by legislative fiat. Thirdly, moral offenses, unlike legal offenses, are always voluntary; it is a complete defense to an alleged breach of a moral rule to prove that one was not a free, responsible agent at the time the act was done, while many laws impose strict liability. Finally, the form of consequences following upon infractions of the rule differs in law and morality; in morality they take the form of diffused social pressure inducing feelings of guilt, shame and remorse, while in law they are officially administered.²³ It is important to note that Hart conceives these features as distinguishing morality, not only from law, but from other types of social rules, e.g. etiquette, dress, as well.²⁴

Hart's account of the morality of duty, like that of justice, poses certain problems even when his

limited goals are taken into consideration. For example, it is assumed, rather than argued, that morality, like law, is best conceived in terms of rules. The only justification offered is his statement that law and morality are similar in that both apply to recurring, regular, situations.²⁵ In view of the fact that at least some have argued that morality is not a matter of rules, some explanation of the way the normative force of morality and moral decisions relate to rules would have been helpful.

More importantly, it never becomes clear precisely what Hart conceives the essential differences between law and morality, between legal obligation and moral obligation, to be. If they have the same source, internal acceptance of the rule, as Hart seems to imply, then what is the difference between them? If different factors account for the distinction, what are they? Hart's four distinguishing characteristics--the importance, immunity from deliberate change, voluntary nature and social means of enforcement of moral as opposed to legal rules--are not as helpful as they might be since they are more like symptoms than an explanation of differences. They themselves require explanation. While each of the four differences seems to indicate the official nature of law due to the operation of secondary rules of recognition,

change and adjudication, Hart makes no such generalization. It is easy to see why. If official recognition and sanctions were made the distinguishing characteristic of law, this would detract from his description of law as rules whose mandatory force stems chiefly from acceptance. Moreover, he would be left with the conclusion that primary rules, where not supported by secondary rules, would be moral, rather than legal rules and that legal obligation, if it could not be accounted for in terms of secondary rules, must be considered as moral obligation.

This picture of the law will be recognized as that advocated in Chapter II of this essay, as avoiding many of the difficulties that beset Hart's account of the mandatory force of law and clarifying the relation of internal acceptance and the role of official acts and sanctions in law. It will be recalled that the distinction was there drawn between legal rules, which take the form of the conditional imperative, and moral rules whose imperative is typically absolute, representing conduct as right or wrong regardless of conditions. Since obligation concerns right and wrong regardless of conditions, and since it had nothing to do with legislative fiat depending on social attitudes according to Hart's own definition, it was conceived as an exclusively moral concept. When we speak of legal obligation, it must be

in the sense of a moral obligation to obey the law, it was argued.

If this view is accepted, then the distinction between law and morality is not paralleled by a distinction between moral and legal obligation, as in Hart's picture, since all obligation is basically moral, even when directed toward laws. Thus the problem of demonstrating the difference between legal and moral obligation which mars Hart's view does not arise. At the same time, the distinction between law and morality is clarified; the four features Hart suggests as embodying the differences can be acknowledged to have their basis in the secondary rules which provide for official recognition, change, and enforcement of the law.

The foregoing view also allows explanation of the salient characteristics of morality in terms of rules, thus eliminating the need to assume, as Hart does, that morality is a matter of rules. The normative force of morality is typically of the absolute imperative form, that is, it is independent of conditions. Obedience out of fear of criticism and social pressure of course must take the form of the conditional imperative. But since morality, unlike law, can only be based on general social acceptance, it will normally take the form of an absolute imperative. Both the conditional and absolute

imperative presuppose rules applicable to classes of persons and courses of conduct. In the cases of other alternatives to rules, such as orders, both a condition and a statement of universal applicability would be misleading; their function is to indicate the applicability of general imperatives, that is, of rules. Similarly, in following or violating a moral precept, an explanation of why the act was done in terms of moral principles and deduction from them will normally constitute an adequate justification for the act, even though another might not share one's choice of moral rules. Thus not only is morality of general application, as Hart points out, but its mandatory force and the justification of moral conduct is based on rules. It would seem to be clear that at least the chief aspects of the morality of duty can be explained in terms of rules.

B. The Morality of Aspiration

Our first concern will be to justify the distinction between the morality of duty and that of aspiration. The distinction may be challenged in one of two ways: (1) it may be questioned whether the morality of aspiration is truly morality; (2) granting (1), it may be argued that morality of aspiration ought not to be categorized separately from the morality of duty.

The question of whether the morality of aspiration ought to be considered to be morality at all is basically a semantic issue, hinging on the breadth of the definition of "morality". For most, the moral life lies in meeting the requirements of the social group of which one is a member. But for a few, the good or moral life requires exceeding society's minimum and doing one's best.

However, several reasons why it is probably better to regard the morality of aspiration as part of morality may be suggested. The first is that both the moralities of duty and aspiration concern the same values, although in different degrees. The morality of aspiration is the superlative form of the morality of duty. There can be no doubt, furthermore, that the ideal influences what constitutes duty. The figure of a scale of values used by Fuller²⁶ is apt. To refuse to call the morality of aspiration true morality would be equivalent to removing the top section of the scale; this cannot be done without affecting the significance of the values that remain. The same figure presents a second reason for considering aspiration morality, namely, the practical difficulty of deciding where the line between the morality of duty and that of aspiration should be drawn. What is conceived as duty, although

generally standardized by social groups varies from group to group and to a lesser degree from person to person within a given group. To draw a line at a fixed point would result in the absurdity that some people would be adhering to standards of social duty which nonetheless could not be deemed morality, while others would be classed as acting morally even though they felt bound by no social obligation. A third reason why duty and aspiration should both be considered forms of morality is that although they may aim at different degrees of social welfare, the end of both is social good.

If these reasons for considering aspiration a form of morality are accepted, the arguments of those who hold the morality of aspiration and duty to be one and the same must be met. Some have contended that if an act is good, part of saying it is good is a recommendation that it is "good" to do. Therefore when we call an act within the realm of the morality of aspiration "good", we are saying that it ought to be done. At this stage the morality of aspiration becomes a standard of duty:

. . . from the premise that if I commend an action, I must, if consistent, be prepared to recommend it, anti-superogationists infer that, if I recommend an action and call it "good", I must, if consistent, be prepared to recommend people to perform the action and to say that they ought to do it.²⁷

Cooper points out that this argument is answered by noting that it uses "recommend" and "ought" without

distinguishing the two different senses in which those can be used--prescriptive and commendatory. "Really ought" is equivalent to the prescriptive sense of "recommend" while "ideally ought" is equivalent to the commendatory sense of "recommend". Only the prescriptive sense justifies blame, criticism, and pressure for conformity. Attainment of the "ideal ought" may be grounds for praise, but failure is generally not justification for censure. Thus when an act within the realm of the morality of duty is recommended, it is recommended as a duty, while to recommend an act beyond social duty, is to suggest an ideal. Thus we conclude that duty and aspiration, while both forms of morality, should retain their separate identities.

An explanation of the salient characteristics of the morality of aspiration differs from that of the morality of duty, as might be expected. Deprived of social pressure, its mandatory force is dependent solely upon internal acceptance of the conduct as right either in terms of itself or some end to be fulfilled. While in the morality of duty, an act is right in itself, worthy ends play a more important role in the morality of aspiration. Both the causal and justificatory explanations of pursuit of moral aspiration, are likely to rest on a defense of ideals as worthy. Although individuals

and even classes of individuals may set rules for conduct beyond the accepted social minimum, the morality of aspiration is typically not a matter of rules. With rules comes the connotation of duty, at least on the person who has bound himself to follow them. Thus although from the point of view of most members of society the life of an ascetic bound to high rules of conduct may seem an example of aspiration, to the ascetic himself his conduct may be a matter of duty to obey rules to which he has committed himself.

The importance of the morality of aspiration to law, it will be seen, is its role in judicial interpretation.

CHAPTER SIX

Our concern thus far has been to determine the similarities and differences between morality and law. We must now apply the conclusions of this limited examination of the nature of morality to the question of what the relationship between law and morality is.

1. Hart's Account of the Relationship of Law and Morality

Hart's main concern in discussing the relationship between law and morality is to show that the necessary intersection of law and morality can be spoken of only in a very limited sense, if at all.¹ If this can be established, then Hart's description of law as the union of primary and secondary rules is secure against those who would argue that morality should be given a central role in a description of law.

Hart admits at least one sense in which law and morality may be said to be related, although not by logical necessity. All legal and moral systems should share a "minimum content of natural law". The basic condition of any legal or moral system is the desire for survival, Hart asserts. Therefore all viable systems must contain certain rules ensuring protection. Agreement on minimum moral and legal guarantees of survival

is made possible by certain facts of human nature: (1) human vulnerability making some form of protection necessary; (2) approximate equality, which means no man or group is immune from the need for protection and thus makes compromise possible; (3) man's limited altruism, which makes forbearance possible; (4) the limited resources of the community which means men must work together to ensure the necessities of survival; (5) man's limited understanding and strength of will which makes possible sacrifices for long-term goals.² Hart admits that while "a society to be viable must offer some of its members a system of mutual forbearances, it need not, unfortunately, offer them to all".³ Thus the slave may be denied basic protections accorded free men.

The minimum content of natural law, described by Hart as a normative concept stating what the law should be, does not indicate a logical or factual necessity in the relation of law to morality. Hart finds other assertions of the necessary connection of law and morals defective; they

. . . either fail to make clear the sense in which the connexion between law and morals is alleged to be necessary; or upon examination they turn out to mean something which is both true and important, but which is most confusing to present₄ as a necessary connexion between law and morals.

Without going into an exhaustive analysis of the meanings which may be attributed to the question of the intersection of law and morality, Hart discusses typical

arguments used to support the contention that there is a necessary intersection of law and morality.

To the argument that since a legal system does not and cannot rest on "mere power of man over man", it must rest on a basis of moral support, Hart replies that it poses a false alternative. Laws may be accepted for reasons other than force and moral obligation, such as calculations of long-term interest, disinterested interest in others, an unreflecting, traditional attitude, or the mere wish to do as others do.⁵

Secondly, while Hart admits the influence of morals on law, he intimates that this is not what is basically in dispute in the issue of the intersection of law and morality: "if this is what is meant by the necessary connexion of law and morals, it should be conceded".⁶

Thirdly, Hart concedes that judicial interpretation may rely on moral considerations, but states that this is not necessarily the case since "judicial law-making has often been blind to social values, 'automatic', or inadequately reasoned."⁷

Fourthly, to the assertion that a good legal system must conform at certain points to morality, Hart replies that "legal systems, with their characteristic structure of primary and secondary rules, have long endured though they have flouted these principles of justice."⁸

Fifthly, as for the claim that where laws are applied consistently and fairly to all falling within their scope, natural justice and morality are thereby manifested, Hart implies that his characterization of these principles might differentiate them from morality in its usual sense⁹ and says "again, if this is what the necessary connexion of law and morality means, we may accept it. It is unfortunately compatible with very great iniquity".¹⁰

Finally, to the claims of some that denial to immoral rules of the status of law is more likely to result in enlightened decisions and resistance to obedience of evil laws, Hart replies with arguments directed at showing the superiority of the wider definition of law encompassing both moral and immoral laws. It is his view that where one is clearly aware of a moral standard external to law, one's resistance to evil is likely to be stiffened. More importantly, preservation of the distinction between law and morality will aid fuller realization of the variety of moral issues at stake in deciding to disobey a law, Hart feels.

The insights offered by Hart's analysis are marred by two ambiguities. The first is the difficulty of deciding in certain instances whether he is concerned with the role of morality in the legal system or in

relation to particular laws. Quite different considerations are involved in each. For example, it might be maintained that the intersection of law and morality is essential to the validity of a legal system, while holding that the validity of a particular law is independent of moral considerations.

The second ambiguity which arises from time to time concerns which aspect of the question of the intersection of law and morality is under discussion. Hart shows considerably more insight into the complexity of the problem than certain others who have discussed it, in so far as he recognizes that the larger question comprehends a number of different issues and that "necessity" can be used in a number of different senses in describing the relationship of law and morals. Unfortunately, he nowhere states what he takes these issues to be. It would seem that the question of the intersection of law and morality has at least four aspects. The reply sought might be a description of the way law and morality as a matter of fact intersect. Or it might be an explanation, perhaps in sociological terms, of the relation between the two considered as factual data. Thirdly, the question of the relation of law and morals might be directed as discovering whether their intersection is necessary for the maintenance and preservation of a legal system.

Finally, the question might be asking for a justification of the relation of law and morality which would involve the problem of what the relationship between law and morality ought to be.

In the hope that Hart's position on the problem of the intersection of law and morals will thereby be made more significant and its merits and defects more apparent, a discussion of his arguments in terms of the foregoing distinctions is proposed.

2. Revised View of the Relationship Between Law and Morality

A. Description

By description is meant a statement of the minimum conditions necessary to identifying or establishing the existence of a legal system. We are concerned with essential features rather than incidental features. Describing in this sense is akin to definition, except that, with Hart, no claim to the pretention that it exhausts all possible correct uses of "law" or "legal system" is made.¹¹ The question of whether there is a necessary intersection of law and morality in the context of description becomes the question of whether, in order to describe a valid rule of law or legal system, it is necessary to refer to morality. The use of the word "necessary" in this way may be termed "logical" necessity.

With respect to the description of a valid law, the most familiar argument for the intersection of law and morality is the Thomistic thesis that bad law is not law. In contrast, it is Hart's view that the validity of an individual law depends only on whether it meets the criteria required by the rule or rules of recognition of the system. The question of whether the validity of particular laws depends on their moral content is more often approached from the normative point of view, and will be discussed in this context presently. However, it may be said at this point that Hart's account of the validity of law seems to best describe the way in which we think and speak of law. Laws are spoken of as "good" or "bad", "just" or "unjust". This indicates that the concept of law is broad enough to include rules which violate moral principles.

Whether the description of a legal system, as opposed to individual rules of law, necessarily involves morality raises quite different considerations. Hart's comments on the minimum content of natural law indicate that he sees such a link between law and morals:

For it is a truth of some importance that for the adequate description not only of law but of many other social institutions, a place must be reserved, besides definitions and ordinary statements of fact, for a third category of statements: those the truth of which is contingent on human beings and the world they live in retaining the salient characteristics which they have.¹²

However, the significance of this statement is marred by ambiguity as to the sense in which Hart conceives the minimum content of natural law to be necessary to law. He initially states that the concept must be understood in a normative, justificatory sense; "in each case the facts mentioned afford a reason why, given survival as an aim, law and morals should include a specific content."¹³ A few pages on, the concept is spoken of in terms of the maintenance of a legal system; ". . . a society to be viable must offer some of its members a system of mutual forbearances".¹⁴ Finally, despite Hart's denials, the minimum content of natural law is at times treated by him as a sociological fact.

These contradictory assertions make it impossible to affirm that Hart views the minimum moral content of law as an element essential to a description of the essential features of a legal system. If, for example, the concept functions as a normative standard indicating what the law should be, it becomes impossible to maintain that a system must embody its principles to constitute a legal system. Whatever its significance, the minimum content of natural law cannot be said to indicate a necessary connexion between a description of the essential features of a legal system and morality.

Other aspects of Hart's theory of law, however,

seem to indicate at least one way in which morality must be involved in the description of all legal systems. It has been seen that Hart characterizes the "core" of a legal system as the union of primary and secondary rules. It has also been observed that he says primary rules are basically moral rules:

The basic element in the shared or accepted morality of a social group consists of rules of the kind which we have already described in Chapter V when we were concerned to elucidate the general idea of obligation,¹⁵ (i.e. primary rules of obligation).

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If primary rules of obligation are the basic element of social morality, and if, as Hart asserts throughout, they are necessary to describe and identify a legal system, it seems to follow that the description of a legal system must involve reference to a moral element.

If, however, instead of Hart's account of law, the modified view advocated in Chapter II of this essay is adopted, we are not forced to the conclusion that morality is an essential part of any description of a legal system. Instead of consisting of primary rules of obligation with their moral aspect and secondary rules, the proposed view distinguishes between a legal system whose hallmark is officially recognized and enforced rules and socially supported moral rules of obligation which may or may not support the legal system. On this view, while morality is allowed a large supporting role,

it is not a necessary part of a description of a legal ^{my int.} system.

Hart tells us that the description of a legal system necessarily entails reference to primary rules and secondary rules, plus certain other elements, one of which appears to be the "penumbral" area of law where judicial discretion is exercised. If judicial interpretation is acknowledged to be influenced by moral values, does this entail that morality is a feature essential to the description of a legal system? The answer would seem to be that the influence of morality in judicial interpretation is one of factual coincidence rather than logical necessity. Hart makes this point when he argues that it is quite possible for judicial decisions to be blind to social values or "automatic". Furthermore, it may be argued that even where decisions in unsettled cases are made with thought and care, reference may be to factors other than morality. For example, judicial decision of the question of whether the Provincial governments of Canada may make international treaties--a point upon which the B.N.A. Act is unclear--might turn on the judges' conceptions of federalism rather than any moral considerations. But while it may not be possible to claim that reference to morality is logically necessary to the decision process of a legal

system, moral considerations--both of the morality of duty and the morality of aspiration--play an important role in influencing interpretation in a good legal system.

In conclusion, it would seem that neither the description of a valid rule of law nor of a legal system necessarily involves reference to morality. Legal rules and legal systems can be identified and their essential features set forth without reference to morality. At the same time, it is apparent that morality may figure incidentally in a description of law in the form of a minimum content of natural law, through the supporting role of morality with respect to law, and in judicial interpretation.

B. Explanation

Considered from the point of view of explanation, the question of whether there is a necessary intersection of law and morality becomes that of whether morality is necessary to an explanation of the development or empirically observable features of individual laws or a legal system. The use of the word "necessary" in this sense may be termed "factual" necessity, as opposed, for example, to "logical necessity". In contrast to descriptive definition with its concern with identification and normative justification whose concern is with what laws

and a legal system ought to be, explanation in this sense concentrates on understanding the empirically observable facts of a legal system. It deals with causes rather than criteria or reasons. Historical, psychological, anthropological and sociological analyses typify explanation.

Turning first to the role of morality in explaining why particular laws are as they are, it would seem that the causal explanation of any law must lie either in development through the doctrine of precedent, in legislation, or in a combination of the two. With respect to development through the doctrine of precedent, it will be recalled that in Chapter III of this essay psychological and sociological factors were found to be relevant to an explanation of the causal aspect of the decision process. Similarly, the acts of legislators can be causally explained in these terms. While it would seem likely that a factual study would reveal that moral ideals and prejudices figure prominently among the psychological and sociological explanations of the content of many laws, it would seem possible to make a law or decide cases on it without being influenced by morality. Thus even if the necessary data were available, it would seem unlikely that it would indicate that the causal explanations of every law depends to some extent

on moral considerations. However, it seems likely that were studies to be made, moral factors would be found important in explaining the development of a great many laws, and hence in explaining the development of a legal system.

Hart's account of the "essence" of a legal system has anthropological, sociological and psychological aspects. More akin to anthropology than sociology is his conception of law's beginnings as a system of primary rules of obligation which in more advanced and complex societies are supplemented by secondary rules of recognition, change and adjudication.

At times Hart treats this conception more as an illustrative model than a statement of fact, acknowledging that it may never be fully realized in any community. Yet at other places he speaks of it and shows concern to verify it as a matter of anthropological fact.¹⁶ If intended as an empirically verified statement of fact, the concept suffers from a lack of supporting data. Hart himself admits that anthropology suggests only "approximations" to this state.¹⁷ Proof that a primitive society without centrally organized laws, courts and sanctions actually functions on a basis of generally accepted obligations is required. Cohen points out that societies in this state may have elaborate power-conferring rules

regulating family and marital relations which a system consisting only of primary rules of obligation cannot explain.¹⁸

Hart's concept of the minimum content of natural law is defended by him as not involving the "causal" considerations of sociology and psychology; his professed concern is not with what the content of law is, but with what it should be.¹⁹ However, he at times betrays his stated aim to engage in an explanation of the minimum content of natural law which can only be considered sociological:

Such rules do in fact constitute a common element in the law and conventional morality of all societies which have progressed to the point where these are distinguished as different forms of social control. . . . Such universally recognized principles which have a basis in elementary truths concerning human beings, their natural environment, and aims, may be considered the minimum content of natural law.²⁰

Hart here is explaining the sociological facts of "a common element in the law and morality of all societies" and "universally recognized principles of conduct", by reference to the psychological facts of man's basic desires and characteristics. He is not concerned with justification, but with explaining certain facts causally in terms of other facts.

In so far as the minimum concept of natural law functions as a sociological and psychological concept, it should be based on factual data. The premises that

there is a shared content of morality in all legal systems and that this shared morality rests on a desire for survival and certain basic qualities of human nature, should not be merely assumed. The dangers of making such assumptions can be illustrated by an example. The results of a survey might well show that rules protecting property from theft are found in all legal systems. Yet a law which prevents a starving man from stealing food from a wealthy man is difficult to account for in terms of survival. Perhaps a larger concept, such as recognition of the right of the individual in society to immunity of person and property is required to explain the minimum content of natural law. The proper explanation can be reached only on the basis of facts about the common content of legal systems and common psychological motives and desires.

Our concern has been with those anthropological, sociological and psychological concepts used by Hart in The Concept of Law. It has been suggested that further development of the ideas central to Hart's account of law, such as the distinction between primary and secondary rules and the concept of internal acceptance, would require supplementing Hart's linguistic method with factual studies in sociology and psychology.²¹ Without going into the complexities of the question of the relevance

of factual data to definitional description, it may be noted that such studies, if undertaken, might well indicate a further intersection of law and morality.

It is necessary to conclude, then, that Hart's explanations of the relation of law and morality in sociological and psychological terms suffer from a dearth of supporting facts. This makes it impossible to state categorically that the intersection of law and morality is necessary to an explanation of a legal system. It is possible, however, to predict that if the necessary studies were undertaken, morality would play an essential part in the resulting explanation of a legal system.

4

C. Maintenance

The subject of maintenance is chiefly relevant to the legal system rather than to particular laws. The question of the necessary intersection of law and morality in this context becomes that of whether morality is essential to the continued functioning of a legal system. This third sense of the word "necessity" might be termed "predictive" or "practical" necessity.

Such an examination is met by two major difficulties. The first is the seeming impossibility of conclusively proving that a given factor is necessary to the continued existence of a legal system. The causes of

the failure of prior legal systems may provide an indication of factors important to ensuring the endurance of a legal system, but this does not allow the conclusion that the same factors at a future time would lead to breakdown of the legal system. As Hume pointed out, the fact that certain events have always been correlated in the past provides no guarantee that this must necessarily happen in the future.²²

A less insurmountable difficulty consists of clarifying what is meant by "maintenance". Does this mean maintenance for ten years, one hundred years or for an indefinite period? It is suggested that instead of attempting to set an arbitrary time period, it is better to think in terms of factors which are necessary to prevent a legal system from becoming unstable. The question thus becomes: "What is necessary to keep a legal system in good health?" This is the approach which Hart seems to adopt, when he speaks of the "stability",²³ "viability"²⁴ and "pathology"²⁵ of a legal system.

Having outlined preliminary difficulties, an examination of some of the arguments which have been put forward for the view that morality is necessary to the maintenance of law may be attempted.

First, it will be recalled that a minimum content of natural law is in Hart's opinion essential to a

"viable" legal system.²⁶ If by "viable", Hart wishes to indicate stability, this is an assertion that unless a system enforces certain minimum standards of morality, it will be unstable. It seems reasonable that if a legal system offers no class of individuals certain protections from threats to their survival, it would not long endure. If this is Hart's contention, it may be accepted.

More significant is the link Hart draws between the stability of a legal system and the acceptance of its laws by most of the people most of the time.²⁷ Since the primary rules of obligation which constitute the basic element of a legal system are generally moral in character, this would seem to indicate a link between the maintenance of a legal system and the moral acceptability of its laws. The claim that a system to be stable and healthy must have the moral approval of a large bulk of the people it governs is recommended by historical fact. Yet although systems in the past have been weakened because they lacked such approval or incurred active popular disapproval, it is difficult, for the reasons mentioned at the outset of this discussion,²⁸ to state categorically that a legal system in which acceptance is based largely on fear of sanctions would break down.

Secondly, it has been urged by some that acceptance by most people of a general moral duty to obey the law, based on the simple fact that it is law rather than the particular content of its rules, is essential to a stable legal system.²⁹ As Hart states this argument in The Concept of Law, it rests on the assertion that since a stable system cannot rest on force alone, it must rest on acceptance of a general moral obligation to obey the law. To this Hart replies that although a system resting on force alone might be unstable, acceptance and stability can be secured by reason of factors other than a conviction that it is morally right to obey the law. Self-interest, altruism, a traditional attitude or acceptance of the rules of law because one approves of their content may replace a moral duty to obey the law. However, even Hart admits:

It may well be that any form of legal order is at its healthiest when there is a generally diffused sense that it is morally obligatory to conform to it.³⁰

While a general acknowledgement of a moral duty to obey the law throughout society would seem to be important to the legal system's stability, it is impossible to state that it is necessary in the Humeian sense of necessity. For that an assumption is necessary, as in the case of Kelsen's prime norm.

Finally, the contention must be met that a

necessary connexion between law and morality is indicated by the fact that without adherence to certain principles of what Lon Fuller calls the internal morality of law no legal system could properly function or continue to be effective. As Fuller explains the concept, the internal morality of law is not concerned with the substantive content of law, but rather with its procedural aspects. Although Fuller conceives some of the conditions constituting the internal morality of law as ideals which belong to the morality of aspiration rather than duty and which can never therefore be fully realized, he maintains that a minimum conformity with the "internal morality" of law is essential to having law at all.

Formulating the components of the internal morality of law negatively, Fuller says that it can be breached in any of eight ways: (1) by a failure to achieve rules at all; (2) by a failure to publicize rules expected to be followed; (3) by the abuse of retroactive legislation; (4) by a failure to make rules understandable; (5) by the enactment of contradictory rules or (6) of rules that require conduct beyond the powers of the affected party; (7) by too frequent changes in the rules; (8) by a failure to administer and enforce rules as announced.³¹

As Hart points out in The Concept of Law, he too

recognizes these principles, although he treats them in terms of the preservation of justice and fairness.³²

Thus in so far as just and fair application of the rules of a system of law are important to its stability, they are important to the stability of a legal system, although for the reasons given earlier, it is difficult to state absolutely that they are necessary for a system's continued existence.

However, Hart takes issue with Fuller's claim that there is a relationship between the internal morality of law and the substantive content of law.³³

Fuller asserts that evil aims cannot have as much coherence and inner logic as good ones, that the principles of the internal morality of law ensure coherence and inner logic, and thus concludes that where the internal morality of law is observed, "the effect will generally be to pull those decisions toward goodness, by whatever standards of goodness there are."³⁴

To this it might be replied that whatever the ascertained purpose of the law, be it bad or good, that aim will be furthered by the public, clear, and consistent application of the law. Since our laws for the most part accord with prevailing moral views, the effect of the requirements of fairness and justice in our system is to further goodness. But the internal morality

is only a procedural principle; if evil ends were the avowed purpose of law, it could well serve to further them.

Fuller makes much of the fact that in Nazi Germany, the perpetration of evil laws was accompanied by a breakdown of procedural justice. Against this it may be argued that the reason why breaches of internal morality were necessary to perpetrate evils was that the evil aims were never frankly acknowledged; the situation was one of reconciling evil deeds to moral aims, which necessitated the cloak of obscurity and contradiction in the formulation and administration of the law. It may be that there will never be a society in which evil aims are frankly accepted so that the internal morality of law could function to further them. But that is immaterial to the point of principle that the connexion between the observance of Fuller's internal morality of law and the substantive "goodness" of law is contingent rather than necessary.

To conclude our examination of the necessity of morality in the maintenance and stability of the legal system, it would seem difficult to predict the continuance of a legal system in the absence of a general moral acceptance of its laws, a general acceptance of a moral obligation to obey the law, or the application of the

law in accordance with principles of justice and fairness. At the same time, the nature of the question makes it impossible to say that there is a necessary connexion between morality and the maintenance of a legal system in the sense in which Hume used the word "necessary" or in any sense akin to logical necessity. If "necessity" were interpreted as "predictive", "practical" necessity, our conclusion might be quite different.

D. Justification.

The aspect of the problem of the relation of law and morality raised by "justification" is the extent to which it is desirable or useful to coalesce the two. This use of the word "necessity" may be described as "normative" or "justificatory" necessity. In order to find a necessary connexion between law and morality in this sense, it will be necessary to show that without some degree of collation between law and morality, detrimental results will follow. This question in turn comprises several sub-questions, two of the most important of which are: (1) whether the best definition of law is a broad one, including both "good" and "bad" rules is preferable to a definition of law which refuses to call any "bad" rule law; (2) the extent to which the law should involve itself in moral issues. While the first

question relates to the validity of individual laws, the second will be seen to be relevant both to particular laws and the legal system. Each of these issues will be considered in turn.

(i) Definition

To approach the problem of definition by a normative evaluation is the exception rather than the rule; usually a definition is thought of as stating the salient features of a concept as ascertained by the way that concept is in fact used. It has already been argued that since we often speak of "bad laws" it would seem that in fact the broader concept of law, defining law without regard to its moral content, is generally accepted. The argument of the natural law thinkers who maintain that evil rules are not law, is not so much a denial of the fact that the broader view of law is accepted, as an argument that it would be better to restructure our thinking in accordance with their views.

We shall confine our discussion of this perennial dispute to the recent controversy between Professor Hart and Professor Fuller. First joined in twin articles in the Harvard Law Review³⁵ it is continued in Hart's book The Concept of Law, to which Professor Fuller replied with a book of his own.³⁶ Among other things, Fuller insists that the separation of law and morality results in

unenlightened decisions, too literal interpretations of the law, hinderance of the evolution of the law, and the obedience of morally iniquitous laws.³⁷ Hart replies that criticism on the basis of an outside standard of morality is necessary for social reform, that the distinction helps to preserve an ordered society, that those who accept that law may be iniquitous will be more likely to recognize their duty not to obey morally iniquitous laws than those who collate law and morality, and that insistence on the distinction between law and morality assures more forthright analysis of all the complicated moral issues involved in civil disobedience.³⁸ It is the last argument, clarity of analysis, which Hart emphasizes in The Concept of Law, perhaps because it is basic to all his other contentions.

The numerical quantity of the differences Hart and Fuller profess and the heat of their controversy, conceal the fact that their positions have much in common. Once semantical differences are stripped away, both are found to favour civil disobedience, that is, disobedience of morally iniquitous laws, in what appear to be the same circumstances. Fuller says that when a rule is morally iniquitous it is not law, and therefore need not be obeyed. Hart says that when a rule is morally iniquitous, you should regard it ~~as~~ ^{as} law (providing

that it meets the formal requirements of the rule of recognition), but refuse to obey it because it is bad law. It seems difficult to state categorically that there would be a greater tendency to reject the iniquitous rule in one case than the other; in any case, such claims are claims of fact and to be conclusive, should be supported by actual proof of a tendency one way or the other. Moreover, it seems equally difficult to say one view presents the issues more clearly than the other, as Hart claims. While it is true that the view advocated by Hart juxtaposes the conflicting duties to obey the law and to act morally by continuing to call bad law law, the same issue is raised on Fuller's view in the decision whether to call what is prima facie law not law. In each case a prima facie duty to obey is overridden by the iniquitousness of the law's content. In each case the basic issue is whether the law is evil enough to justify defiance of the official order of society. Neither formulation seems unclear or ambiguous and neither seems to oversimplify the moral issues at stake. As for Fuller's contentions that the distinction between law and morality will give rise to unenlightened, literal decisions and hinder the growth of the law toward greater justice, they seem as unsusceptible of proof as Hart's claim that legal reform will be hindered if only moral law is law

and we cease to talk about bad law in terms of an outside standard.

The degree of consensus between Hart and Fuller on the most fundamental issues, as well as the difficulty of proving many of their claims for the superiority of their respective views, seems to preclude a clear answer to the question of which is the better way to define law. In the absence of an indication that one definition is better than the other, the only alternative is to fall back on the commonly accepted usage of the term "law" which, it has been seen, suggests a concept of law broad enough to include morally "bad" laws.

(ii) Legislation of Morality

Having considered justifications for separating law and morality, we turn now to the question of whether morality should be legislated, and if so, to what extent.

It may be stated initially that for a legal system to be considered "good" there must be what Hart might call a "minimum content of natural law". Even John Stuart Mill, who advocated a minimum of interference of the law in moral issues, recognized law and morality would overlap to the extent of guaranteeing protection of person and property. Thus it may be said that the intersection of law and morality is necessary for a good legal system, assuming that there is consensus on the minimum necessary

for a good legal system, for example, consensus that the law should protect property and person.

The question then becomes that of the extent beyond this minimum to which morals should be legislated. It is this question which has been widely discussed recently by Lord Devlin, Hart, Wollheim, Dean Rostow and others.⁴⁰ Lord Devlin, in a paper later elaborated in the book The Enforcement of Morals, developed the view that a collective moral consciousness is basic to society, and that society therefore has the right to legislate against any principle which offends its collective morality. What the collective morality is is to be determined by twelve ordinary jurymen. Even then, the legislators must refuse to punish anything which does not lie beyond the limits of tolerance:

It is not nearly enough to say that a majority dislike a practice; there must be a real feeling of reprobation . . . disgust . . . deeply felt and not manufactured.⁴¹

Devlin suggests that the basis of society's right to legislate against anything which offends its collective morality is its right to prevent the degeneration of society.⁴²

Hart, in a series of papers and the book Law, Liberty and Morality, has criticized Devlin's logic, his mode of argument, and his assumption that the failure to legislate morality may be the primrose path to social

destruction. He has presented arguments against the law's interference in morality beyond what is necessary to ensure a minimum security: (1) the cost of enforcement; (2) the impracticality of general control; (3) inequalities of treatment; (4) morality is morally valueless if enforced; (5) the misery created for individuals by enforcing, for example, laws of private sexual morality.⁴³

We are not concerned with this issue except in so far as it is related to discussions in The Concept of Law. It will be recalled that in Chapter V of this essay, it was suggested that the Aristotelian concept of procedural justice adopted and revised by Hart was unable to explain all of the ways in which the words "just" and "unjust" are used, and that therefore a substantive aspect of justice should be recognized. For a legal system to be just, it was suggested, not only must the law distribute burdens and benefits fairly among individuals, but it must guarantee certain rights, freedoms and responsibilities which members of the group conceive as minimum natural rights. This view has two important consequences relevant to the extent to which morality should be legislated. First, it decrees that certain minimal moral precepts must be afforded legal recognition. Secondly, it implies that beyond these minimum

levels, people must be allowed freedom to engage in activities generally conceived to be within the individual's prerogative. Thus a law may be unjust in the substantive sense either by failing to provide certain protections thought of as fundamental, or by infringing what is considered to be the individual's right of freedom. Criticism of a legal system as unjust because it fails to provide laws against theft is an example of the first sort of injustice; criticism of the law against homosexual practices is an example of the second. What one considers just or unjust in either case depends on one's views of man's rights and capacities. The fact that in a given society most people share a similar conception of man's basic rights and freedoms (for example, the capitalistic, individualistic conception of man in western countries as opposed to the socialistic ideals of eastern Europe) allows postulation of a fairly definite line between those areas of morals on which there should be legislation and those which should be left to individual choice. It is only in the exceptional case, where there is substantial divergence rather than general consensus within the society with respect to whether a law infringes or would infringe a right or freedom (as on the issue of homosexuality), that dispute arises.

The concept of substantive justice offers an

explanation of how and why the line is drawn between areas of morality considered subject to legislation and aspects of morality where legislation is not tolerated. The explanation shares with Lord Devlin's view a reliance on the moral views of society as the basic test for the extent to which morality should be legislated. But it is both more stringent and more "rational"⁴⁴ than Devlin's view in that it demands the possibility of justification of legislation on moral matters in terms of a prevailing conception of human nature and the advisability of accepting a certain view of man's rights and freedoms. With those of John Stuart Mill and Hart, such an explanation emphasizes the importance of recognizing an area of self-assertion and individual freedom, although it does not confine the right to legislate to an arbitrary minimum, as does Mill's view.

3. Conclusion

The conclusions of the foregoing analysis lead us to concur with Hart in his position that the relationship between law and morality is not one of logical necessity. At the same time, however, it indicates that to phrase the question of the relationship between law and morality in terms of logical necessity, is to slight other equally important ways in which law and morality intersect.

The logically distinct, yet complementary, roles of law and morality first became apparent in the examination of the mandatory force of law in Chapter II; there it was seen that officially recognized and enforced rules of law benefit from the supporting normative force of moral obligation. The analyses of the legal decision process in Chapter III indicated how moral considerations influence decisions made on the basis of legal rules. Finally, the foregoing discussion of whether there is a necessary connexion between law and morality has demonstrated that while a logically necessary connexion may be impossible to prove, morality is almost certainly "factually" necessary to an explanation of law, and without doubt "practically" necessary to the maintenance and "normatively" necessary to the justification of a legal system. The resultant picture is that of a system of legal rules, distinct from, yet in various ways supported by, moral rules and ideals.

FOOTNOTES TO CHAPTER ONE

¹H.L.A. Hart, The Concept of Law (London: Oxford University Press), 1961.

²Ibid., p. 6.

³Ibid., pp. 6 - 17.

⁴Ibid., pp. 16 - 17.

⁵Ibid., pp. 14 - 15.

⁶Ibid., pp. 15, 79. Although Hart claims he is not seeking a definition, critics have pointed out that in fact The Concept of Law does define law, not in terms of genus et differentiam, but by setting forth the elements essential to law; see Marcus G. Singer, "Book Review", J. Phil., Vol. 60 (1963), p. 197 at 200; Stuart M. Brown, Jr., "Book Review", Phil. Rev., Vol. 72, (1963), p. 251.

⁷Hart, Ch. II, III. IV.

⁸Ibid., Ch. III.

⁹Ibid., pp. 49 - 54.

¹⁰Ibid., pp. 64 - 76.

¹¹Ibid., pp. 33 - 41.

¹²Ibid., p. 96.

¹³Ibid., pp. 84 - 85.

¹⁴Ibid., p. 79.

¹⁵Ibid., pp. 89 - 95.

¹⁶Ibid., pp. 55 - 56.

¹⁷Ibid., p. 83.

¹⁸Ibid., Ch. III, where Hart replaces the Austinian combination of sanction and habitual obedience by



internal acceptance, and pp. 79 - 88, where he presents the concept of obligation as his explanation "of the fact that where there is law, there human conduct is made in some sense non-optional or obligatory".

¹⁹Ibid., p. 89.

²⁰Ibid., p. 113.

²¹Ibid., p. 96.

²²Ibid., p. 127.

²³Ibid., pp. 127, 138, 130. Here Hart distinguishes between the "core" area of law where rules provide the basis of decisions, from the "penumbral" area of open texture, where rules are replaced by general standards requiring the exercise of discretion.

²⁴Ibid., pp. 164 - 176.

²⁵Ibid., pp. 169 - 176.

²⁶Ibid., pp. 181 - 189.

²⁷Ibid., pp. 203 - 207; H.L.A. Hart, "Positivism and the Separation of Law and Morals", Harvard Law Rev., Vol. 71 (1958), p. 593. On occasion Hart treats the distinction between the law "as it is" and "as it ought to be" as identical with the separation of law and morality; for a criticism of this see Summers, Robert S., "Professor H.L.A. Hart's Concept of Law", Duke L.J., Vol. 1963, p. 629 at pp. 656 - 657.

²⁸Hart, Concept of Law, pp. 189 - 195, 196.

²⁹Herbert Morris, "Book Review", Harvard Law Rev., Vol. 75, (1962), p. 1452 at 1460; Graham Hughes, "Book Review", Mod. Law Rev., Vol. 25 (1962), p. 319 at 333.

³⁰Robert S. Summers, "Professor H.L.A. Hart's Concept of Law", Duke L.J., Vol. 1963, p. 629 at 647; Alf Ross, "Book Review", Yale L.J., Vol. 71 (1962), p. 1185 at 1189.

³¹J.A. Coutts, "Book Review", J. Soc. Public Teachers of Law (1962), p. 35.

³²J. Kemp, "Book Review", Phil. Quarterly, Vol. 13 (1963), p. 188 at 189.

FOOTNOTES TO CHAPTER TWO

¹H.L.A. Hart, The Concept of Law (London: Oxford University Press), 1961, pp. 79, 80.

²Herbert Morris, "Book Review", Harvard Law Rev., Vol. 75 (1962), p. 1452 at 1457.

³See Wedberg, "Some Problems on the Logical Analysis of Legal Science", Theoria, Vol. 17 (1951), pp. 246, 252.

⁴Hart, The Concept of Law, pp. 198, 199.

⁵Ibid., pp. 109 - 110.

⁶Ibid., p. 106.

⁷Ibid., p. 193.

⁸Ibid., pp. 198, 199.

⁹Ibid., p. 88.

¹⁰Ibid., p. 32.

¹¹Ibid., p. 139. Graham Hughes, "Book Review", Mod. L.J., (1962), p. 326 at 332, says that the fact of official duties indicates that there is not such a clear difference between primary and secondary rules as Hart indicates.

¹²Graham Hughes, "Review", Mod. L.J., Vol. 25 (1962), p. 319 at 330.

¹³Hart, The Concept of Law, Note 7.

¹⁴Ibid., p. 198.

¹⁵Ibid., p. 113.

¹⁶Ibid., p. 165.

¹⁷Ibid., p. 166.

¹⁸Ibid., p. 7.

¹⁹Ibid., p. 168, where Hart admits that the characteristics which law and morals cannot share "have proved most difficult to formulate". J.A. Coutts, "Book Review", J. Soc. Public Teachers of Law (1962), p. 35, doubts the success of Hart's distinction between law and morality: "It would appear that neither the importance of a rule, nor its immunity from change, nor its voluntary character, nor the form of moral pressure can be said to identify a moral rule."

²⁰Hart, The Concept of Law, p. 226.

²¹Ibid., pp. 168 - 169. On the externality of law and internality of morality, see Hermann Kantorowicz, A Definition of Law, edited by A.H. Campbell, (Cambridge University Press), 1958, pp. 33 - 51.

²²Hart, The Concept of Law, p. 235.

²³Ibid., p. 34.

²⁴Ibid., p. 33.

²⁵Marcus G. Singer, "Book Review", J. Phil., Vol. 60, (1963), p. 197 at 208, criticizes Hart's concept of obligation as "not altogether adequate, for it does not seem capable of accounting for what is meant by such expressions as 'the duty of a judge' or 'a court is bound to follow precedent'" and concludes that this provides "excellent evidence that, although law may be distinct from morality in the ways that Hart maintains it is (Ch. X), it is not altogether distinct". It is suggested that conceiving obligation as a purely moral phenomenon solves the problems of accounting for the duties of officials while embodying in precise form Singer's suggestion that morality is involved in the explanation.

FOOTNOTES TO CHAPTER THREE

¹H. L. A. Hart, The Concept of Law (London: Oxford University Press), 1961, p. 21.

²Ibid., p. 120.

³Ibid., pp. 50 - 60. .

⁴Ibid., pp. 60 - 64.

⁵Ibid., pp. 43 - 48.

⁶Ibid., pp. 153 - 163.

⁷Ibid., p. 127.

⁸Aristotle, "Nichomachean Ethics," Bk. V, Ch. X, The Basic Works of Aristotle, edited by Richard McKeon, (New York: Random House), 1941, pp. 1019 - 1020. Aristotle states that where the universal rule does not yield the correct result or a case arises which is not covered by the universal statement, the rule of law must be supplemented by equity which allows the judge to decide on the basis of fairness.

⁹Hart, The Concept of Law, p. 130.

¹⁰Ibid., p. 132.

¹¹Jeremy Bentham, A Comment on the Commentaries, Everett Ed., 1928, p. 190, offers an example of a deductive account of law.

¹²C. Sumner Lobinger, "Precedent in Past and Present Legal Systems," Michigan L.J., Vol. 44 (1946), p. 955, offers a summary of the history of the declaratory theory of judicial decision.

¹³John Chipman Gray, The Nature and Sources of Law (Boston: Beacon Press), 2nd Ed., 1921, p. 94.

¹⁴Oliver Wendell Holmes, "The Path of the Law", Harvard Law Rev., Vol. 10 (1897), p. 457 at 461.

¹⁵For example, see Bingham, "What is Law?", Michigan Law Rev., Vol. II (1912), pp. 1109; Hutcheson, "The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decisions," Cornell Law Quarterly, Vol. 14, p. 274; Jerome Frank, Law and the Modern Mind, 6th Ed. (New York: Anchor Books, Doubleday & Co. Inc.) 1963; Llewellyn, "A Realistic Jurisprudence--The Next Step," Col. Law Rev., Vol. 30, p. 431; Moore, "The Rational Basis of Legal Institutions," Col. Law Rev., Vol. 23 (1923), p. 609; Oliphant, "Facts, Opinions and Value Judgments," Texas Law Rev., Vol. 10 (1932), p. 127.

¹⁶Roscoe Pound, "What of Stare Decisis?", Fordham Law Rev., Vol. 10 (1941), p. 1.

¹⁷Hermann Kantorowicz, "Some Rationalism About Realism," Yale L.J., Vol. 43 (1934), p. 1240 at 1246.

¹⁸Hart, The Concept of Law, pp. 81 - 88.

¹⁹John Austin, "A Plea for Excuses," Proceedings of The Aristotelian Society, Vol. 57 (1956-57), p. 1; Ludwig Wittgenstein, Philosophical Investigations, trans. by G.E.M. Anscombe (London: Basil Blackwell), 1963, p. 217. For an application of the distinction between cause and justification, see Richard A. Wasserstrom, The Judicial Decision, (Stanford, California: Stanford University Press), 1961, where the author's sole concern is a theory of legal justification.

²⁰Wittgenstein, Philosophical Investigations, pp. 197 - 202, 210 - 212, 217, 219, 611 - 659.

²¹H.J. Melden, "Action", Freedom and Responsibility, Edited by Herbert Morris (Stanford, California: Stanford University Press), 1961, 149 at 153; The Philosophical Review, Vol. 65 (1956), p. 523.

²²The concept of rule-following as largely a non-intellectual matter of acting in a customary, learned fashion, also clarifies difficulties attending Hart's concept of "acceptance" of the law. Alf Ross, "Book Review", Yale L.J., Vol. 75 (1962), p. 1185 at 1189, says that Hart's use of the word "acceptance" to depict the internalization of a rule is misleading, indicating a deliberate decision; "Most people will feel themselves bound by the social norms of the group without ever being conscious of any choice or decision". Hart recognizes that few know the details of most laws, and so

introduces the idea of acceptance by passive acquiescence (p. 60). A better explanation lies in the fact that one can know a rule in the sense of knowing what constitutes proper conduct, without having intellectually digested its details. As one grows up, one learns certain lawful patterns of action, without perhaps ever encountering or making a conscious decision about the rule in its statutory form.

²³Aristotle, loc. cit.

²⁴Richard A. Wasserstrom, The Judicial Decision, p. 112.

²⁵Hart, The Concept of Law, pp. 125 - 127.

²⁶Pound, "What of Stare Decisis?", pp. 9 - 12; Roscoe Pound, An Introduction to the Philosophy of Law (New Haven and London: Yale University Press), 1965, Ch. III.

²⁷Hart, The Concept of Law, pp. 130, 132.

²⁸H.L.A. Hart, "Positivism and the Separation of Law and Morals", Harvard Law Rev., Vol. 71 (1958), p. 593 at 607.

²⁹This, the broadest of the methods advocated for determining the ratio of a case, is that of A. Goodhart, "Determining the Ratio Decidendi of a Case," Essays in Jurisprudence and the Common Law (Cambridge, England: The University Press), 1937.

³⁰H.L.A. Hart, "Ascription of Responsibility and Rights", Proceedings of the Aristotelian Society. New Series, Vol. 49 (1949), p. 171.

³¹Supra, pp. 47 - 48.

³²Supra., p. 49.

³³Edward H. Levi, An Introduction to Legal Reasoning (Chicago and London: Phoenix Books, The University of Chicago Press), 1963, p. 3.

FOOTNOTES TO CHAPTER FOUR

¹Hart, The Concept of Law, pp. 78, 79.

²Ibid., pp. 27 - 41.

³Ibid., p. 32.

⁴L. Jonathan Cohen, "Book Review", Mind, Vol. 71 (1962), p. 395 at 396 - 397, suggests that the word "capacities" would be preferable to "powers", arguing that we generally speak of the capacity to contract, marry, make a will, etc. and reserve "power" for specific persons or classes of persons.

⁵Hart, The Concept of Law, pp. 58 - 60, 92, Ch. VI.

⁶Ibid., p. 111.

⁷Ibid., p. 79.

⁸Marcus G. Singer, "Book Review", J. Phil., Vol. 60 (1963), p. 197 at 208, suggests that Hart conceives secondary rules in two different ways, first as co-extensive with power-conferring rules and later as consisting of the rule of recognition, rules of change, and rules of adjudication. However, Hart nowhere says that these three types exhaust the category of secondary rules, leaving Singer's interpretation, however plausible, open to challenge.

⁹Herbert Morris, "Book Review", Harvard Law Rev., Vol. 75 (1962), p. 1452 at 1460.

¹⁰Ibid., p. 1461.

¹¹Singer, op. cit., p. 209.

¹²Ibid.

¹³Graham Hughes, "Book Review", Mod. Law Rev., Vol. 25 (1962), p. 319 at 332.

¹⁴Supra, pp. 61, 62.

¹⁵Hughes, op. cit., p. 331.

- ¹⁶Supra, p. 31.
- ¹⁷Hart, The Concept of Law, pp. 245, 246.
- ¹⁸Ibid., pp. 198, 199.
- ¹⁹Ibid., p. 246.
- ²⁰Ibid., pp. 205, 206.
- ²¹Ibid., p. 226.
- ²²Alf Ross, "Book Review", Yale L.J., Vol. 75 (1962), p. 1185 at 1186.
- ²³Lon L. Fuller, The Morality of Law (New Haven and London: Yale University Press), 1964, p. 141.
- ²⁴Singer, op. cit., pp. 213, 214.
- ²⁵Hart, The Concept of Law, pp. 105 - 106.
- ²⁶Cohen, op. cit., p. 408.
- ²⁷Hart, The Concept of Law, Ch. II, III, IV.
- ²⁸Ibid., pp. 20, 21.
- ²⁹R. MacGregor Dawson, Democractic Government in Canada (Toronto: University of Toronto Press, The Copp Clark Publishing Co. Limited), pp. 12 - 13.
- ³⁰Morris, op. cit., pp. 1454 - 1457.
- ³¹Hart, The Concept of Law, p. 122.
- ³²Ibid., p. 38.
- ³³Ibid., pp. 130, 132.
- ³⁴Supra, pp. 50 - 51.
- ³⁵Ibid.
- ³⁶Hart, The Concept of Law, pp. 176 - 180.

FOOTNOTES TO CHAPTER FIVE

¹Robert S. Summers, "Professor H.L.A. Hart's Concept of Law", Duke Law Journal, Vol. 1963, p. 629 at 648.

²Hart, The Concept of Law, p. 163.

³Ibid., p. 155.

⁴Ibid.

⁵Ibid., p. 156; this has led Ross ("Book Review", Yale L.J., Vol. 75 (1962), p. 1185 at 1187, 1188) to claim that "just" and "unjust" are devoid of meaning when applied to a legal rule.

⁶Hart, The Concept of Law, pp. 156, 157.

⁷Ibid., p. 159.

⁸Ibid.

⁹Ibid., pp. 160 - 161.

¹⁰Ibid., p. 160.

¹¹Summers, op. cit., at 660.

¹²Aristotle, "Nichomachean Ethics", Bk. V, Ch. 3, 4, The Basic Works of Aristotle, edited by Richard McKeon (New York: Random House), 1941, pp. 1006 - 1010.

¹³Summers, op. cit.

¹⁴Hart, The Concept of Law, p. 163.

¹⁵Plato, "The Republic", Book III, The Dialogues of Plato, Vol. I, Translated by E. Jowett (New York: Random House) 1937, pp. 648ff.

¹⁶Honore, "Social Justice", 8 McGill L.J. (1962), p. 77 at 79.

¹⁷Hart, The Concept of Law, pp. 176 - 180.

¹⁸Lon L. Fuller, The Morality of Law (New Haven and London: Yale University Press), 1964, pp. 5 - 32.

¹⁹Neil Cooper and R.J. Edgley, "Rules and Morality", Proceedings of the Aristotelian Society, New Series, Vol. 33 (1959), p. 159.

²⁰Hart, The Concept of Law, pp. 163 - 164.

²¹Ibid., p. 164.

²²Ibid., pp. 166 - 168.

²³Ibid., pp. 169 - 176.

²⁴Ibid., p. 176.

²⁵Ibid., pp. 166, 168.

²⁶Fuller, The Morality of Law, pp. 9 - 13.

²⁷Hart, The Concept of Law, p. 162.

FOOT NOTES TO CHAPTER SIX

¹Hart, The Concept of Law, p. 181.

²Ibid., pp. 190 - 195.

³Ibid., p. 196.

⁴Ibid., p. 198.

⁵Ibid., pp. 198 - 199.

⁶Ibid., p. 200.

⁷Ibid., pp. 200 - 201.

⁸Ibid., p. 201.

⁹Ibid., p. 202.

¹⁰Ibid.

¹¹To consider the question of the relationship of law and morality from the point of view of definitional description is quite appropriate, since it is clear that despite Hart's denials of attempting a definition of law, he does in fact define it, not in terms of genus et differentiam, but by indicating the elements which constitute the "essence" of a concept of law. It is in this sense of description that the question of the necessity of the relationship between law and morality is posed. (See Singer, "Book Review", J. Phil., Vol. 60 (1963), p. 197 at 200, and Stuart M. Brown, Phil. Rev., Vol. 72 (1963), p. 251, for arguments that Hart is in fact defining law in The Concept of Law.)

¹²Hart, The Concept of Law, p. 195.

¹³Ibid., p. 189.

¹⁴Ibid., p. 196.

¹⁵Ibid., p. 165.

¹⁶Ibid., pp. 165, 244.

- ¹⁷Ibid., p. 244.
- ¹⁸L. Jonathan Cohen, "Book Review", Mind, Vol. 71 (1962), p. 296 at 310.
- ¹⁹Hart, The Concept of Law, p. 189.
- ²⁰Ibid., pp. 188 - 189.
- ²¹Graham Hughes, "Book Review", Mod. Law Rev., Vol. 25 (1962), pp. 326 - 333.
- ²²David Hume, The Treatise of Human Nature, contained in Hume Selections, Edited by Charles W. Hendell, Jr., (New York: Charles Scribner's Sons), 1955, pp. 146 - 150.
- ²³Hart, The Concept of Law, p. 226.
- ²⁴Ibid., p. 196.
- ²⁵Ibid., pp. 114 - 120.
- ²⁶Ibid., p. 196.
- ²⁷Ibid., pp. 197, 198.
- ²⁸Ibid., pp. 102, 103.
- ²⁹Ibid., pp. 198, 226, 246; see Hermann Kantorowicz, A Definition of Law, Edited by A. H. Campbell (Cambridge: Cambridge University Press), 1958, p. 50.
- ³⁰Hart, The Concept of Law, p. 226.
- ³¹Fuller, The Morality of Law, pp. 33 - 94.
- ³²Hart, The Concept of Law, p. 202.
- ³³Ibid.
- ³⁴Lon L. Fuller, "Positivism and Fidelity to Law--A Reply to Professor Hart", Harvard Law Rev., Vol. 71 (1958), p. 630 at 636.
- ³⁵H.L.A. Hart, "Positivism and the Separation of Law and Morals"; Lon L. Fuller, "Positivism and Fidelity to Law", Harvard Law Rev., Vol. 71 (1958), pp. 593 ff.

³⁶Fuller, The Morality of Law.

³⁷Fuller, "Positivism and Fidelity to Law", pp. 630 - 672.

³⁸Hart, "Positivism and the Separation of Law and Morals", pp. 593 - 629.

³⁹Hart, The Concept of Law, pp. 202 - 207.

⁴⁰Patrick Devlin, The Enforcement of Morals (London: Oxford University Press), 1965; H.L.A. Hart, Law, Liberty, and Morality (New York: Vintage Books, Random House), 1963; H.L.A. Hart, "Immorality and Treason", The Listener, July 30, 1959, p. 162; H.L.A. Hart, "The Use and Abuse of the Criminal Law", The Oxford Lawyer, Hilary, 1961, p. 7; Eugene V. Rostow, "The Enforcement of Morals", The Maccabean Lecture in Jurisprudence of the British Academy (Oxford University Press) 1959; Richard Wollheim, "Crime, Sin and Mr. Justice Devlin", Encounter, Nov. 1959, p. 34.

⁴¹Devlin, op. cit., p. 17.

⁴²Ibid., p. 13.

⁴³Hart, "The Use and Abuse of the Criminal Law", pp. 7ff.

⁴⁴One of Hart's main objections to Devlin's thesis is the non-rational basis of "disgust" and "reprobation" on which the latter justifies the legislation of morality.

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12

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